No. 14593

# United States Court of Appeals

for the Ninth Circuit

JOHN WILSON, LEONARD WHITE, PAUL BOGOVICH and ELIZABETH TINTORRI,
Appellants,

vs.

B. L. KENNEDY, FORD Q. ELVIDGE, HOWARD D. PORTER and RICHARD TAITANO,
Appellees.

# Transcript of Record

Appeal from the District Court of Guam,
Territory of Guam

FILED
MAR 10 1955
PAUL P. O'BRIEN,
CLERK

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, California—2-4-55

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]


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LEON D. FLORES,
Island Attorney,
RICHARD ROSENBERRY,
Deputy Island Attorney,
Agana, Guam,

For Appellees.

In the District Court of Guam, Unincorporated Territory of Guam

Civil Case No. 27-54

JOHN WILSON, LEONARD WHITE and PAUL BOGOVICH and ELIZABETH TINTORRI,
Plaintiffs,

vs.

B. L. KENNEDY, FORD Q. ELVIDGE, HOWARD D. PORTER and RICHARD TAITANO,
Defendants.

## COMPLAINT

Plaintiffs for their claims allege:

### I.

The action arises under the provisions of Sections 1421a, 1421b, 1421c(b), 1421h, 1421i, 1422g and 1424 of Title 48 of U.S.C.A., and 1340, 1341, 1343 and 2202, of Title 28 of U.S.C.A.; these claims are joined pursuant to the provisions of the Federal Rules of Civil Procedure. There is a common question of law involved in all claims.

### II.

That plaintiffs, all citizens of the United States of America, have been residents of the unincorporated territory of Guam from 1951 to the present time; and have derived their entire income from sources within said unincorporated territory of Guam during said period of time; that no portion

of said income has been earned as an employee of the United States of America or of any agency thereof.

That defendant B. L. Kennedy has, since the year 1953, been holding himself out to be the Commissioner of Revenue and Taxation of the unincorporated territory of Guam, claiming to have been duly appointed to such office pursuant to law with the power and duty to collect a territorial income tax; that defendant Ford Q. Elvidge has, since the year 1953, been the Governor of the unincorporated territory of Guam; that defendant Howard D. Porter has, since the year 1953, been the Attorney General of the unincorporated territory of Guam and that defendant Richard Taitano has, since the year 1952, been the Director of Finance of the unincorporated territory of Guam.

III.

This action is brought on behalf of the plaintiffs, as well as on behalf of each and all other persons similarly situated who are residents of the unincorporated territory of Guam and who have been coerced into paying monies to the defendants herein under the alleged territorial income tax law, or who have been coerced into withholding sums of money from employees and paying the said sums over to defendants under the alleged territorial income tax law and on behalf of all other persons upon whom demands and threats of levy and assessment have been made or to whom threats of coercive action, civil and criminal, have been made, unless they com-

plied with the illegal demands of the defendants herein, and for the recovery of alleged territorial income taxes illegally collected from plaintiffs in the amounts and for the calendar years set forth below.

Plaintiff John Wilson the sum of One Thousand One Hundred Thirty Six and 80/100 Dollars ($1,136.80) for the calendar year 1952 and the sum of One Thousand Four Hundred Seventy Six and 80/100 Dollars ($1,476.80) for the calendar year 1953. Plaintiff Leonard White, the sum of One Thousand One Hundred Forty Seven and 90/100 Dollars ($1,147.90) for the calendar year 1951 and the sum of One Thousand Seven Hundred Twenty Three and 30/100 Dollars ($1,723.30) for the calendar year 1953.

And as such, collected by the said B. L. Kennedy and his predecessors in office claiming to be Commissioner of Revenue and Taxation of the unincorporated territory of Guam.

## IV.

That the defendants and their predecessors in office claim that since the 1st day of August, 1950, there has existed as a territorial statute of the unincorporated territory of Guam, a tax law which is textually the same as the income tax laws of the United States of America, and that these defendants, or some of them, have the right to administer, interpret, enforce and collect the same, and that said alleged territorial income tax was created and enacted by Section 1421f, Title 48, U.S.C.A.

V.

That pursuant to said claims of defendants and their predecessors in office, said defendants have caused to be published numerous notices, claims, and demands, by radio, the public press, public posting of notices, and by letters of instruction and demand sent through the United States mails, asserting the existence of the alleged territorial income tax, their alleged right to enforce said claimed tax, their right to interpret the alleged tax, and have threatened to invoke the application of and use numerous penalties, both criminal and civil, and other coercive measures alleged to be contained therein; and that they have claimed the right of assessment of the alleged tax and of the alleged criminal and civil penalties therein contained, and the right to utilize the coercive measures, including the summary proceedings contained in the United States Internal Revenue Code, and other criminal and civil penalties therein contained.

VI.

That by means of these threats and coercion the defendants have illegally collected the sums hereinabove set out in Paragraph III, and further, have collected vast sums of money from numerous other persons, and have illegally converted the same to the benefit and use of the unincorporated territory of Guam.

VII.

That defendants, by illegal threats to invoke and use criminal and civil penalties and other coercion,

have caused and procured the employers of the plaintiffs John Wilson and Leonard White to withhold various sums of money from their wages and to pay the same over to defendants in violation of the provisions of Section 1621 et sec. of the United States Internal Revenue Code, said sections being illegally claimed by defendants to be incorporated in the alleged territorial income tax laws.

VIII.

That defendants, by illegal threats and coercion have required plaintiffs Paul Bogovich and Elizabeth Tintorri, to withhold and pay over to defendants various sums of money aggregating in excess of Three Thousand Six Hundred Dollars ($3,600.00) during the period 1951 to 1953, due and owing to employees of said plaintiffs, as salaries and wages, in violation of the provision of Section 1621 et sec. of the United States Internal Revenue Code, which sections defendants illegally claim to be incorporated in the alleged territorial income tax law.

IX.

That said sums referred to in Paragraphs VII and VIII above have been illegally converted by defendants to the uses and benefit of the Government of the unincorporated territory of Guam.

X.

That defendants have illegally threatened to apply the alleged coercive and summary provisions of the Internal Revenue Code of the United States of America against the plaintiffs and any other

person who has resisted or refused to acknowledge their right to levy, assess, interpret, collect and administer the alleged territorial income tax or to file returns and pay the same.

XI.

That defendants have coerced the plaintiffs and others to pay the alleged tax by threats to use the purported enforcement procedures which defendants claimed to be contained in said alleged territorial income tax, and continue to so threaten the plaintiffs and many others.

XII.

That the defendants have unlawfully usurped the duties, responsibilities and authority of the Commissioner of Internal Revenue of the United States; the legislative authority of the Congress of the United States; have unlawfully usurped the authority of the United States Courts; in that defendants illegally claim and exercise the right and authority to substitute words, clauses, phrases and sentences; to interlineate words, clauses, phrases and sentences, and to delete or amend any or all portions of the Internal Revenue Code of the United States claimed by them to have been incorporated into the statutes of the unincorporated territory of Guam by the provisions of Section 1421f, Title 48, U.S.C.A.

XIII.

That no statute of the United States authorizes

any of the defendants to exercise the powers so claimed or grants the authority being illegally exercised by the defendants.

XIV.

That no statute of the unincorporated territory of Guam authorizes the imposition, assessment, collection or enforcement of an alleged territorial income tax.

XV.

That no statute of the unincorporated territory of Guam creates the office of Commissioner of Internal Revenue or any other office with the authority and duty to levy, assess, collect, interpret or administer an alleged territorial income tax.

XVI.

That no statute of the United States of America, or the unincorporated territory of Guam, provides for relief or any appellate procedure in instances where under the alleged territorial income tax the taxpayer seeks relief from excessive, illegal, arbitrary or void imposition of tax.

XVII.

That no statute of the United States of America authorizes appeals under the alleged territorial income tax either to the Tax Court of the United States or to the Court of Claims of the United States, and no statute of the unincorporated territory of Guam provides any similar means of seeking or obtaining judicial relief as provided for by

the statutes of the United States for taxpayers claiming a right to relief under the alleged territorial income tax.

XVIII.

That no statute of the unincorporated territory of Guam provides for repayment of any income tax illegally collected or provides any means for its recovery.

XIX.

That no statute of the unincorporated territory of Guam permits bringing suit against officials of the unincorporated territory of Guam in their official capacity with respect to the alleged territorial income tax.

XX.

That the alleged territorial income tax of Guam and the illegal means by which it is being attempted to be collected, deprives and attempts to deprive plaintiffs and many others of their property without due process of law, in violation of statutes of the United States and Section 1421g, Title 48, U.S.C.A.

XXI.

That by reason of the facts set forth in the complaint, there is now due and owing from the defendants to Plaintiff John Wilson the sum of Two Thousand Six Hundred Thirteen and 60/100 Dollars ($2,613.60) and to Plaintiff Leonard White the sum of Two Thousand Eight Hundred Seventy One and 20/100 Dollars ($2,871.20), which sums were

unlawfully levied, assessed and collected and no part of said sums have been repaid to plaintiffs.

XXII.

That unless the defendants are restrained and enjoined from pursuing their illegal acts as hereinbefore set forth they will, as the plaintiffs believe and so allege, continue to attempt to compel the plaintiffs to comply with the claimed provisions of the alleged territorial income tax, and the plaintiffs and numerous other persons will be forced to submit to the confiscation of their property and monies without due process of law and in violation of their rights under the laws of the United States as hereinbefore alleged, and will be subjected to great and irreparable loss and damage.

Wherefore, plaintiffs demand:

Judgment against the defendants jointly and severally for the following sums, together with interest. Plaintiff John Wilson, the sum of Two Thousand Six Hundred Thirteen and 60/100 Dollars ($2,613.60); Plaintiff Leonard White, the sum of Two Thousand Eight Hundred Seventy One and 20/100 Dollars ($2,871.20).

That such sums as were illegally collected by Plaintiffs Paul Bogovich and Elizabeth Tintorri under the instruction and orders of defendants or their predecessors in office and pursuant to such orders, paid over to the defendants, be refunded to the persons lawfully entitled to such sums and that defendants be required to give Plaintiffs Paul Bog-

ovich and Elizabeth Tintorri a proper receipt and release therefor.

That defendants be enjoined and restrained from further illegal levys, assessment and collection, contrary to law, of an illegal territorial income tax.

That a declaratory judgment be entered that

1. There is no territorial income tax for the unincorporated territory of Guam created by Section 1421a, Title 48, U.S.C.A., or at all.

2. That there is no officer of the unincorporated territory of Guam authorized to levy, assess or collect a territorial income tax.

3. That the Internal Revenue Code of the United States of America has not been incorporated in the codes of law of the unincorporated territory of Guam, and does not constitute a part of the tax laws of Guam.

4. That no officer of the unincorporated territory of Guam has the right or duty to interpret, alter or amend the Internal Revenue Code of the United States of America.

5. That the acts of the defendants deny to plaintiffs the right to due process of law and constitute the unlawful taking of property of the plaintiffs in violation of Section 1421a, Title 48, U.S.C.A.

6. That in the statutes of the unincorporated territory of Guam the plaintiffs have no adequate remedy at law.

For costs of suit and for such other and further relief as to the court may be deemed proper.

Dated at Agana, Guam, this 30th day of April, 1954.

/s/ FINTON J. PHELAN, JR.,
Attorney for Plaintiffs.
/s/ E. R. CRAIN,
Attorney for Plaintiffs.

[Endorsed]: Filed April 30, 1954.

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[Title of District Court and Cause.]

## ORDER GRANTING EXTENSION OF TIME

On Motion of B. L. Kennedy, Howard D. Porter and Richard Taitano, defendants, and the stipulation of the parties showing good cause, leave is hereby given defendants to serve and file their answers or preliminary pleadings as they may desire to the complaint up to and including the 10th day of June, 1954.

Dated this 14th day of May, 1954.

/s/ PAUL D. SHRIVER,
Judge, District Court of Guam

[Endorsed]: Filed May 14, 1954.

[Title of District Court and Cause.]

## MOTION

The defendants, B. L. Kennedy, Ford Q. Elvidge, Howard D. Porter and Richard Taitano move the court as follows:

1. To dismiss the action because the complaint fails to state a claim against the defendants upon which relief can be granted.

2. To enter summary judgment for the defendants on the ground that the complaint and affidavits attached herewith show that the defendants are entitled to judgment as a matter of law.

3. To dismiss the action because the court does not have jurisdiction over the subject matter.

Dated this 9th day of June, 1954.

/s/ HOWARD D. PORTER,
Attorney General,

/s/ LEON D. FLORES,
Island Attorney,

/s/ LOUIS A. OTTO, JR.,
Deputy Island Attorney,

/s/ RICHARD ROSENBERRY,
Deputy Island Attorney,
Attorneys for Defendant

[Endorsed]: Filed June 9, 1954.

[Title of District Court and Cause.]

## AFFIDAVIT OF FORD Q. ELVIDGE

Territory of Guam,
Agana, Guam—ss.

Defendant Ford Q. Elvidge, being duly sworn, deposes as follows:

1. That he is the duly appointed Governor of Guam, having assumed office on March 27, 1953.

2. That the Department of Finance, under the Director of Finance, has the function of assessing and collecting all taxes, including the territorial income tax enacted by Section 31 of the Organic Act of Guam, 48 U.S.C.A. 1421i.

3. That the Director of Finance, as head of the Department of Finance within the Executive Branch of the government of Guam, is responsible for and has the supervision of the administration and enforcement of all tax laws and the assessment and collection of all taxes, including the territorial income tax enacted by Section 31 of the Organic Act of Guam, 48 U.S.C.A. 1421i.

4. That the Defendant, Richard Taitano, on the date that this affiant assumed office of Governor of Guam was Director of Finance of the government of Guam and that from that date to the present date has continuously been Director of Finance as aforesaid and that as such Director of Finance has

performed the duties of such office as hereinabove stated.

/s/ FORD Q. ELVIDGE

Subscribed and sworn to before me this 9th day of June, 1954.

[Seal] /s/ [Illegible]
Notary Public for the Territory of Guam

[Endorsed]: Filed June 9, 1954.

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[Title of District Court and Cause.]

## AFFIDAVIT OF RICHARD TAITANO

Territory of Guam,
Agana, Guam—ss.

Defendant Richard Taitano, being duly sworn, states as follows:

1. That he has been the duly appointed Director of the Department of Finance since May 1952, and that as such he has had and continues to have the responsibility for and supervision of the assessment and collection of all taxes, including the territorial income tax as provided in Section 31 of the Organic Act of Guam, Section 1421i, Title 48 U.S.C.A.

2. That the functions of assessing and collecting such territorial income tax have since May 1952, been in the Department of Finance under the supervision and direction of the Director thereof as part

of the general function of such Department to enforce the revenue and tax laws, and to the best of this affiant's information and belief these functions have been assigned to and performed by the Director of the Department of Finance since the effective date of Section 31 of the Organic Act of Guam.

3. That B. L. Kennedy was duly appointed by this affiant to the office of Commissioner of Revenue and Taxation of the Government of Guam; which office is an intregal part of the Department of Finance of the Government of Guam, and that the primary duty assigned and delegated unto the Commissioner of Revenue and Taxation has been and is the enforcement and administration of the territorial income tax under Section 31 of the Organic Act of Guam.

/s/ RICHARD F. TAITANO

Subscribed and sworn to before me this 9th day of June, 1954.

[Seal] /s/ [Illegible]
Notary Public for the Territory of Guam

[Endorsed]: Filed June 9, 1954.

[Title of District Court and Cause.]

## NOTICE OF MOTION

To: Finton J. Phelan, Jr., and E. R. Crain, Attorneys for Plaintiffs.

Please take notice that the foregoing Motion will be brought on for hearing before the Honorable Paul D. Shriver, Judge of the above entitled Court in his Courtoom in the Guam Congress Building on Friday, the 30th day of July, 1954, at 9:30 a.m., or as soon thereafter as counsel can be heard.

Dated this 9th day of June, 1954.

/s/ HOWARD D. PORTER,
Attorney General

/s/ LEON D. FLORES,
Island Attorney

/s/ LOUIS A. OTTO, JR.,
Deputy Island Attorney

/s/ RICHARD ROSENBERRY,
Deputy Island Attorney
Attorneys for the Defendants

[Endorsed]: Filed June 10, 1954.

[Title of District Court and Cause.]

## REQUEST FOR ADMISSION OF FACTS

To: Howard D. Porter, Louis A. Otto, Richard Rosenberry and Leon D. Flores, Attorneys for Defendants, Office of the Attorney General, Government of Guam, Agana, Unincorporated Territory of Guam.

Please take notice that the plaintiffs hereby request the defendant B. L. Kennedy, pursuant to Rule 36 of the Federal Rules of Civil Procedure, to admit, within ten (10) days after service of this request for the purpose of the above entitled action only and subject to all pertinent objections to admissibility which may be interposed at the trial, the truth of the facts as contained in Exhibit A hereto attached and by reference herein incorporated.

Dated this 19th day of July, 1954.

/s/ FINTON J. PHELAN, JR.,
Attorney for Plaintiffs
E. R. CRAIN,
Attorney for Plaintiffs

## EXHIBIT "A"

1. That the defendants claim that there exists an income tax within the unincorporated territory of Guam, the text of which is identical with the text of the United States income tax laws, as contained in Title 26, USCA.

2. That the entire text of the United States in-

Exhibit "A"—(Continued)

come tax laws as amended is to be found in Title 26, USCA.

3. That nowhere in the published and promulgated codes of the unincorporated territory of Guam is found the text of the income tax law claimed by defendants to exist.

4. That the Government of Guam has never published or promulgated the text of the income tax law claimed by defendants to exist.

5. That the legislature of the unincorporated territory of Guam has not enacted any statute with respect to the income tax law claimed by defendants to exist.

6. That the legislature of the unincorporated territory of Guam has not enacted any enabling legislation providing for the assessment, levy and collection of the income tax claimed by defendants to exist.

7. That the Government of Guam has not published or promulgated any regulations with respect to the territorial income tax claimed by defendants to exist.

8. That the United States Congress has not enacted any legislation authorizing the defendants or any other officers of the Government of Guam to collect the territorial income tax alleged by defendants to exist.

9. That the entire text of the United States income tax law and the collection procedures therein contained is to be found in sub-title A of Title 26, USCA and is comprised in the sections numbered

Exhibit "A"—(Continued)

as follows: 1-4, 11, 12, 13, 15, 21, 22, 23-28, 31, 32, 35, 41-48, 51-63, 101-131, 141-150, 153, 154, 161-172, 181-184, 186-191, 201-207, 211-221, 231-236, 238, 251, 252, 261, 262, 263, 271-277, 291-298, 311, 312, 321, 322, 331-340, 361, 362, 371-373, 391, 392, 394, 395, 396, 400-404, 421-424, 430-459, 461-465, 470, 471, 472, 474, 480-482, 500-504, 506-508, 700-705, 1100-1106, 1110, 1111-1121, 1130-1133, 1140-1146.

10. (a) That Chapter VI, Title 26, USCA is not a part of the income tax law of the United States.

(b) That Chapter VII, Title 26, USCA, is not a part of the income tax law of the United States.

(c) That Chapter VIII, Title 26, USCA is not a part of the income tax law of the United States.

(d) That Chapter IX, Title 26, USCA is not a part of the income tax law of the United States.

(e) That Chapter IX A, Title 26, USCA is not a part of the income tax law of the United States.

(f) That Chapter X, Title 26, USCA is not a part of the income tax law of the United States.

(g) That Chapter XI, Title 26, USCA is not a part of the income tax law of the United States.

(h) That Chapter XII, Title 26, USCA is not a part of the income tax law of the United States.

(i) That Chapter XIII, Title 26, USCA is not a part of the income tax law of the United States.

(j) That Chapter XIV, Title 26, USCA is not a part of the income tax law of the United States.

(k) That Chapter XV, Title 26, USCA is not a part of the income tax law of the United States.

Exhibit "A"—(Continued)

(l) That Chapter XVI, Title 26, USCA is not a part of the income tax law of the United States.

(m) That Chapter XVII, Title 26, USCA is not a part of the income tax law of the United States.

(n) That Chapter XVIII, Title 26, USCA is not a part of the income tax law of the United States.

(o) That Chapter XIX, Title 26, USCA is not a part of the income tax law of the United States.

(p) That Chapter XX, Title 26, USCA is not a part of the income tax law of the United States.

(q) That Chapter XXI, Title 26, USCA is not a part of the income tax law of the United States.

(r) That Chapter XXII, Title 26, USCA is not a part of the income tax law of the United States.

(s) That Chapter XXIII, Title 26, USCA is not a part of the income tax law of the United States.

(t) That Chapter XXIV, Title 26, USCA is not a part of the income tax law of the United States.

(u) That Chapter XXV, Title 26, USCA is not a part of the income tax law of the United States.

(v) That Chapter XXVI, Title 26, USCA is not a part of the income tax law of the United States.

(w) That Chapter XXVII, Title 26, USCA is not a part of the income tax law of the United States.

(x) That Chapter XXVIII, Title 26, USCA is not a part of the income tax law of the United States.

(y) That Chapter XXIX, Title 26, USCA is not a part of the income tax law of the United States.

(z) That Chapter XXX, Title 26, USCA is not a part of the income tax law of the United States.

(aa) That Chapter XXXI, Title 26, USCA is not

Exhibit "A"—(Continued)

a part of the income tax law of the United States.

(bb) That Chapter XXXII, Title 26, USCA is not a part of the income tax law of the United States.

(cc) That Chapter XXXIII A, Title 26, USCA is not a part of the income tax law of the United States.

11. That the Congress of the United States has not enacted any legislation authorizing defendants to jointly

(a) Construe the income tax laws of the United States.

(b) Interpret the income tax laws of the United States.

(c) Make any additions to the text of the income tax laws of the United States.

(d) Make any deletions from the income tax laws of the United States.

(e) Make any substitution of words or phrases in the income tax laws of the United States.

(f) Enforce the income tax laws of the United States.

(g) Collect the income tax of the United States.

(h) Levy the income tax of the United States.

(i) Assess the income tax of the United States.

(j) Apply, with respect to the collection of the alleged territorial income tax, any remedies or coercive measures contained in Title 26, USCA.

(k) Apply, with respect to the collection of the alleged territorial income tax, any civil penalties contained in Title 26, USCA.

Exhibit "A"—(Continued)

(l) Apply, with respect to the collection of the alleged territorial income tax, any criminal penalties contained in Title 26, USCA.

12. That the Congress of the United States has not enacted any legislation authorizing defendants collectively to

(a) Construe the income tax laws of the United States.

(b) Interpret the income tax laws of the United States.

(c) Make any additions to the text of the income tax laws of the United States.

(d) Make any deletions from the income tax laws of the United States.

(e) Make any substitution of words or phrases in the income tax laws of the United States.

(f) Enforce the income tax laws of the United States.

(g) Collect the income tax of the United States.

(h) Levy the income tax of the United States.

(i) Assess the income tax of the United States.

(j) Apply, with respect to the collection of the alleged territorial income tax, any remedies or coercive measures contained in Title 26, USCA.

(k) Apply, with respect to the collection of the alleged territorial income tax, any civil penalties contained in Title 26, USCA.

(l) Apply, with respect to the collection of the alleged territorial income tax, any criminal penalties contained in Title 26, USCA.

13. That the Congress of the United States has

Exhibit "A"—(Continued)

not enacted any legislation authorizing defendant B. L. Kennedy to

(a) Construe the income tax laws of the United States.

(b) Interpret the income tax laws of the United States.

(c) Make any additions to the text of the income tax laws of the United States.

(d) Make any deletions from the income tax laws of the United States.

(e) Make any substitution of words or phrases in the income tax laws of the United States.

(f) Enforce the income tax laws of the United States.

(g) Collect the income tax of the United States.

(h) Levy the income tax of the United States.

(i) Assess the income tax of the United States.

(j) Apply, with respect to the collection of the alleged territorial income tax, any remedies or coercive measures contained in Title 26, USCA.

(k) Apply, with respect to the collection of the alleged territorial income tax, any civil penalties contained in Title 26, USCA.

(l) Apply, with respect to the collection of the alleged territorial income tax, any criminal penalties contained in Title 26, USCA.

14. That the Congress of the United States has not enacted any legislation authorizing defendant Ford Q. Elvidge to

(a) Construe the income tax laws of the United States.

Exhibit "A"—(Continued)

(b) Interpret the income tax laws of the United States.

(c) Make any additions to the text of the income tax laws of the United States.

(d) Make any deletions from the income tax laws of the United States.

(e) Make any substitution of words or phrases in the income tax laws of the United States.

(f) Enforce the income tax laws of the United States.

(g) Collect the income tax of the United States.

(h) Levy the income tax of the United States.

(i) Assess the income tax of the United States.

(j) Apply, with respect to the collection of the alleged territorial income tax, any remedies or coercive measures contained in Title 26, USCA.

(k) Apply, with respect to the collection of the alleged territorial income tax, any civil penalties contained in Title 26, USCA.

(l) Apply, with respect to the collection of the alleged territorial income tax, any criminal penalties contained in Title 26, USCA.

15. That the Congress of the United States has not enacted any legislation authorizing defendant Richard Taitano to

(a) Construe the income tax laws of the United States.

(b) Interpret the income tax laws of the United States.

(c) Make any additions to the text of the income tax laws of the United States.

Exhibit "A"—(Continued)

(d) Make any deletions from the income tax laws of the United States.

(e) Make any substitution of words or phrases in the income tax laws of the United States.

(f) Enforce the income tax laws of the United States.

(g) Collect the income tax of the United States.

(h) Levy the income tax of the United States.

(i) Assess the income tax of the United States.

(j) Apply, with respect to the collection of the alleged territorial income tax, any remedies or coercive measures contained in Title 26, USCA.

(k) Apply, with respect to the collection of the alleged territorial income tax, any civil penalties contained in Title 26, USCA.

(l) Apply, with respect to the collection of the alleged territorial income tax, any criminal penalties contained in Title 26, USCA.

16. That the Congress of the United States has not enacted any legislation authorizing defendant Howard D. Porter to

(a) Construe the income tax laws of the United States.

(b) Interpret the income tax laws of the United States.

(c) Make any additions to the text of the income tax laws of the United States.

(d) Make any deletions from the income tax laws of the United States.

(e) Make any substitution of words or phrases in the income tax laws of the United States.

Exhibit "A"—(Continued)

(f) Enforce the income tax laws of the United States.

(g) Collect the income tax of the United States.

(h) Levy the income tax of the United States.

(i) Assess the income tax of the United States.

(j) Apply, with respect to the collection of the alleged territorial income tax, any remedies or coercive measures contained in Title 26, USCA.

(k) Apply, with respect to the collection of the alleged territorial income tax, any civil penalties contained in Title 26, USCA.

(l) Apply, with respect to the collection of the alleged territorial income tax, any criminal penalties contained in Title 26, USCA.

17. That no statute of the United States of America can be cited containing any grant of authority or delegation of power to the defendants jointly to

(a) Construe the income tax laws of the United States.

(b) Interpret the income tax laws of the United States.

(c) Make any additions to the text of the income tax laws of the United States.

(d) Make any deletions from the income tax laws of the United States.

(e) Make any substitution of words or phrases in the income tax laws of the United States.

(f) Enforce the income tax laws of the United States.

(g) Collect the income tax of the United States.

Exhibit "A"—(Continued)

(h) Levy the income tax of the United States.

(i) Assess the income tax of the United States.

(j) Apply, with respect to the collection of the alleged territorial income tax, any remedies or coercive measures contained in Title 26, USCA.

(k) Apply, with respect to the collection of the alleged territorial income tax, any civil penalties contained in Title 26, USCA.

(l) Apply, with respect to the collection of the alleged territorial income tax, any criminal penalties contained in Title 26, USCA.

18. That no statute of the United States of America can be cited containing any grant of authority or delegation of power to the defendants collectively to

(a) Construe the income tax laws of the United States.

(b) Interpret the income tax laws of the United States.

(c) Make any additions to the text of the income tax laws of the United States.

(d) Make any deletions from the income tax laws of the United States.

(e) Make any substitution of words or phrases in the income tax laws of the United States.

(f) Enforce the income tax laws of the United States.

(g) Collect the income tax of the United States.

(h) Levy the income tax of the United States.

(i) Assess the income tax of the United States.

(j) Apply, with respect to the collection of the

Exhibit "A"—(Continued)

alleged territorial income tax, any remedies or coercive measures contained in Title 26, USCA.

(k) Apply, with respect to the collection of the alleged territorial income tax, any civil penalties contained in Title 26, USCA.

(l) Apply, with respect to the collection of the alleged territorial income tax, any criminal penalties contained in Title 26, USCA.

19. That no statute of the United States of America can be cited containing any grant of authority or delegation of power to the defendant B. L. Kennedy to

(a) Construe the income tax laws of the United States.

(b) Interpret the income tax laws of the United States.

(c) Make any additions to the text of the income tax laws of the United States.

(d) Make any deletions from the income tax laws of the United States.

e. Make any substitution of words or phrases in the income tax laws of the United States.

(f) Enforce the income tax laws of the United States.

(g) Collect the income tax of the United States.

(h) Levy the income tax of the United States.

(i) Assess the income tax of the United States.

(j) Apply, with respect to the collection of the alleged territorial income tax, any remedies and coercive measures contained in Title 26 USCA.

(k) Apply, with respect to the collection of the

Exhibit "A"—(Continued)

alleged territorial income tax, any civil penalties contained in Title 26, USCA.

(l) Apply, with respect to the collection of the alleged territorial income tax, any criminal penalties contained in Title 26, USCA.

20. That no statute of the United States of America can be cited containing any grant of authority or delegation of power to the defendant Ford Q. Elvidge to

(a) Construe the income tax laws of the United States.

(b) Interpret the income tax laws of the United States.

(c) Make any additions to the text of the income tax laws of the United States.

(d) Make any deletions from the income tax laws of the United States.

(e) Make any substitution of words or phrases in the income tax laws of the United States.

(f) Enforce the income tax laws of the United States.

(g) Collect the income tax of the United States.

(h) Levy the income tax of the United States.

(i) Assess the income tax of the United States.

(j) Apply, with respect to the collection of the alleged territorial income tax, any remedies and coercive measures contained in Title 26, USCA.

(k) Apply, with respect to the collection of the alleged territorial income tax, any civil penalties contained in Title 26, USCA.

(l) Apply, with respect to the collection of the

Exhibit "A"—(Continued)

alleged territorial income tax, any criminal penalties contained in Title 26, USCA.

21. That no statute of the United States of America can be cited containing any grant of authority or delegation of power to the defendant Richard Taitano to

(a) Construe the income tax laws of the United States.

(b) Interpret the income tax laws of the United States.

(c) Make any additions to the text of the income tax laws of the United States.

(d) Make any deletions from the income tax laws of the United States.

(e) Make any substitution of words or phrases in the income tax laws of the United States.

(f) Enforce the income tax laws of the United States.

(g) Collect the income tax of the United States.

(h) Levy the income tax of the United States.

(i) Assess the income tax of the United States.

(j) Apply, with respect to the collection of the alleged territorial income tax, any remedies and coercive measures contained in Title 26, USCA.

(k) Apply, with respect to the collection of the alleged territorial income tax, any civil penalties contained in Title 26, USCA.

(l) Apply, with respect to the collection of the alleged territorial income tax, any criminal penalties contained in Title 26, USCA.

22. That no statute of the United States of

Exhibit "A"—(Continued)

America can be cited containing any grant of authority or delegation of power to the defendant Howard D. Porter, to

(a) Construe the income tax laws of the United States.

(b) Interpret the income tax laws of the United States.

(c) Make any additions to the text of the income tax laws of the United States.

(d) Make any deletions from the income tax laws of the United States.

(e) Make any substitution of words or phrases in the income tax laws of the United States.

(f) Enforce the income tax laws of the United States.

(g) Collect the income tax of the United States.

(h) Levy the income tax of the United States.

(i) Assess the income tax of the United States.

(j) Apply, with respect to the collection of the alleged territorial income tax any remedies and coercive measures contained in Title 26, USCA.

(k) Apply, with respect to the collection of the alleged territorial income tax, any civil penalties contained in Title 26, USCA.

(l) Apply, with respect to the collection of the alleged territorial income tax, any criminal penalties contained in Title 26, USCA.

23. That the defendants and and other agents of the Department of Finance of the Government of Guam have

Exhibit "A"—(Continued)

(a) Demanded payment from numerous persons of a territorial income tax.

(b) Published notices in the newspapers within the unincorporated territory of Guam directing various persons to pay a territorial income tax.

(c) Issued forms and letters of instruction to numerous persons on Guam with respect to the collection and payment of a territorial income tax.

(d) Informed numerous citizens of their obligations claimed to exist under a claimed territorial income tax.

(e) Written letters of demand to numerous citizens demanding payment to the defendants Kennedy and Taitano, or their agents, of sums claimed to be due under a claimed territorial income tax.

(f) Exercised the right to assess a claimed territorial income tax.

(g) Publicly claimed the existence of civil penalties with respect to the enforcement of the claimed territorial income tax.

(h) Publicly claimed the existence of criminal penalties with respect to the enforcement of the claimed territorial income tax.

24. That the defendant Taitano has personally or through his agents and servants, accepted payment from various citizens of sums of money, pursuant to the said claimed territorial income tax.

25. That the defendant Kennedy has personally or through his agents and servants, accepted payment from various citizens of sums of money pursuant to the said claimed territorial income tax.

Exhibit "A"—(Continued)

26. That the defendant, B. L. Kennedy, personally and through his agents, has interpreted the claimed territorial income tax by

(a) Deleting words from the text of the United States income tax law as found in Title 26, USCA.

(d) Deleting clauses and phrases from the text of the United States income tax law as found in Title 26, USCA.

(c) Adding words to the text of the United States income tax law as found in Title 26, USCA.

(d) Adding clauses and phrases to the text of the United States income tax law as found in Title 26, USCA.

(e) Substituting words in the text of the United States income tax law as found in Title 26, USCA.

(f) Substituting clauses and phrases in the text of the United States income tax law as found in Title 26, USCA.

(g) Published interpretations of the meaning and effect of the United States income tax law as found in Title 26, USCA.

27. That the defendant, Ford Q. Elvidge, personally and through his agents, has interpreted the claimed territorial income tax by

(a) Deleting words from the text of the United States income tax law as found in Title 26, USCA.

(b) Deleting clauses and phrases from the text of the United States income tax law as found in Title 26, USCA.

Exhibit "A"—(Continued)

(c) Adding words to the text of the United States income tax law as found in Title 26, USCA.

(d) Adding clauses and phrases to the text of the United States income tax law as found in Title 26, USCA.

(e) Substituting words in the text of the United States income tax law as found in Title 26, USCA.

(f) Substituting clauses and phrases in the text of the United States income tax law as found in Title 26, USCA.

(g) Publishing interpretations of the United States income tax law as found in Title 26, USCA.

28. That the defendant, Richand Taitano, personally and through his agents, has interpreted the claimed territorial income tax by

(a) Deleting words from the text of the United States income tax law as found in Title 26, USCA.

(b) Deleting clauses and phrases from the text of the United States income tax law as found in Title 26, USCA.

(c) Adding words to the text of the United States income tax law as found in Title 26, USCA.

(d) Adding clauses and phrases to the text of the United States income tax law as found in Title 26, USCA.

(e) Substituting words in the text of the United States income tax law as found in Title 26, USCA.

(f) Substituting clauses and phrases in the text of the United States income tax law as found in Title 26, USCA.

(g) Publishing interpretations of the United

Exhibit "A"—(Continued)

States income tax law as found in Title 26, USCA.

29. That the defendant, Howard D. Porter, personally and through his agents, has interpreted the claimed territorial income tax by

(a) Deleting words from the text of the United States income tax law as found in Title 26, USCA.

(b) Deleting clauses and phrases from the text of the United States income tax law as found in Title 26, USCA.

(c) Adding words to the text of the United States income tax law as found in Title 26, USCA.

(d) Adding clauses and phrases to the text of the United States income tax law as found in Title 26, USCA.

(e) Substituting words in the text of the United States income tax law as found in Title 26, USCA.

(f) Substituting clauses and phrases in the text of the United States income tax law as found in Title 26, USCA.

(g) Publishing interpretations of the United States income tax law as found in Title 26, USCA.

30. That no statute of the United States has enlarged the jurisdiction of the Tax Court of the United States to include any matters arising under the territorial tax law claimed to exist within the unincorporated territory of Guam.

31. That no statute of the unincorporated territory of Guam has created a court with similar jurisdiction to that of the Tax Court of the United States.

32. That no statute of the unincorporated terri-

Exhibit "A"—(Continued)

tory of Guam provides for suits to recover income taxes

(a) Illegally collected under a territorial income tax law.

(b) Erroneously collected under a territorial income tax law.

(c) Overpaid under a territorial income tax law.

33. That Chapter 34 of Title 26, USCA

(a) Is part of the United States Internal Revenue Code.

(b) Is not within the income tax sections of the United States Internal Revenue Code.

(c) Has not been extended to the unincorporated territory of Guam by any act of the United States Congress.

(d) Has not been extended to the unincorporated territory of Guam by any act of the Guam Legislature.

34. That Section 3640, Title 26, USCA has not been amended by any act of the United States Congress and refers solely to the Commissioner of Internal Revenue of the United States of America.

35. That Section 3647, Title 26, USCA specifically restricts delegation of authority, duties or functions of the Commissioner of Internal Revenue to officers or employees of the United States Bureau of Internal Revenue, and then only pursuant to such regulations as may be approved by the Secretary of the Treasury.

36. That Section 3650, Title 26, USCA provides for the establishment by the President, of Collec-

Exhibit "A"—(Continued)

tion Districts for the collection of all internal revenue taxes of the United States.

37. That Section 3650 B of Title 26, USCA restricts the total number of Collection Districts to not to exceed 65.

38. That Section 3653 of Title 26, USCA applies solely to United States internal revenue taxes.

39. That sub-chapter A of Chapter 36, Title 26, USCA refers specifically to internal revenue taxes of the United States and their collection.

40. That sub-chapter B of Chapter 36, Title 26, USCA refers specifically to internal revenue taxes of the United States and their collection.

41. That sub-chapter C of Chapter 36, Title 26, USCA refers specifically to internal revenue taxes of the United States and their collection.

42. That sub-chapter D of Chapter 36, Title 26, USCA refers specifically to internal revenue taxes of the United States and their collection.

43. That sub-chapter E of Chapter 36, Title 26, USCA refers specifically to internal revenue taxes of the United States and their collection.

44. That the defendant, B. L. Kennedy, while an officer of the unincorporated territory of Guam, was not an officer or employee of the United States Bureau of Internal Revenue or of the United States Treasury Department.

45. (a) That the defendant, Ford Q. Elvidge, is not an officer or employee of the United States Bureau of Internal Revenue or of the United States Treasury Department.

Exhibit "A"—(Continued)

(b) That the defendant, Howard D. Porter, is not an officer or employee of the United States Bureau of Internal Revenue or of the United States Treasury Department.

(c) That the defendant, Richard Taitano, is not an officer or employee of the United States Bureau of Internal Revenue or of the United States Treasury Department.

46. That the Secretary of the Treasury of the United States has not delegated any duty or authority provided for by the United States statutes with respect to internal revenue to (a) B. L. Kennedy, (b) Ford Q. Elvidge, (c) Richard Taitano, (d) Howard D. Porter, (e) any officer of the unincorporated territory of Guam.

47. That the Commissioner of Internal Revenue of the United States has not delegated any duty or authority provided for by the United States statutes with respect to internal revenue to (a) B. L. Kennedy, (b) Ford Q. Elvidge, (c) Richard Taitano, (d) Howard D. Porter, (e) any officer of the unincorporated territory of Guam.

48. That the President of the United States has not delegated any duty or authority provided for by United States statutes with respect to internal revenue to (a) B. L. Kennedy, (b) Ford Q. Elvidge, (c) Richard Taitano, (d) Howard D. Porter (e) any officer of the unincorporated territory of Guam.

49. That Section 3770 Title 26, USCA does not confer any authority on defendant B. L. Kennedy

Exhibit "A"—(Continued)

or any employee or agent of the Government of Guam.

50. That Section 3770, Title 26, USCA does not confer any authority on defendant Ford Q. Elvidge or any employee or agent of the Government of Guam.

51. That Section 3770, Title 26, USCA does not confer any authority on defendant Richard Taitano or any employee or agent of the Government of Guam.

52. That Section 3770, Title 26, USCA does not confer any authority on defendant Howard D. Porter or any employee or agent of the Government of Guam.

53. That no statute of the United States has made Section 3770, Title 26, USCA applicable to any person but the Commissioner of Internal Revenue of the United States.

54. That Section 3772, Title 26, USCA refers solely to (a) taxes of the United States (b) the Commissioner of Internal Revenue of the United States.

55. That Section 3777, Title 26, USCA, makes mandatory the reporting by the Commissioner of Internal Revenue of the United States to the Joint Committee on Internal Revenue Taxation of the United States and prohibits refund or credit until 30 days after such report of the facts and the decision of the Commissioner.

56. That Section 3791 of Title 26, USCA, authorizes the Commissioner of Internal Revenue, with

Exhibit "A"—(Continued)

the approval of the Secretary of the Treasury, to make rules and regulations with respect to the Internal Revenue Code of the Code of the United States.

57. That the Commissioner of Internal Revenue of the United States and the Secretary of the Treasury of the United States have not delegated any part of this authority to B. L. Kennedy.

58. That the Commissioner of Internal Revenue of the United States and the Secretary of the Treasury of the United States have not delegated any part of this authority to Ford Q. Elvidge.

59. That the Commissioner of Internal Revenue of the United States and the Secretary of the Treasury of the United States have not delegated any part of this authority to Richard Taitano.

60. That the Commissioner of Internal Revenue of the United States and the Secretary of the Treasury of the United States have not delegated any part of this authority to Howard D. Porter.

61. That the Commissioner of Internal Revenue of the United States is not authorized to delegate any part of this authority to any of the defendants.

62. That the Secretary of the Treasury of the United States is not authorized to delegate any part of this authority to any of the defendants.

63. (a) That section 3797, Title 26, USCA defines the term "United States" when used in a geographical sense to include only the states, the territories of Hawaii and Alaska and the District of Columbia.

(b) That Section 3797, Title 26, USCA defines

Exhibit "A"—(Continued)

the term "state" to include the territories of Alaska and Hawaii and the District of Columbia where such construction is necessary.

(c) That Section 3797, Title 26, USCA defines the term "Secretary" as the Secretary of the Treasury of the United States.

(d) That Section 3797, Title 26, USCA defines the term "Commissioner" to mean the Commissioner of Internal Revenue of the United States.

64. That no statute of the United States has amended the definitions contained in 63 (a) (b) (c) and (d) above.

65. That no statute of the unincorporated territory of Guam has amended the definitions contained in 63 (a) (b) (c) and (d) above.

66. That Section 3900, Title 26, USCA, provides that the Commissioner of Internal Revenue shall (a) be in the Department of the Treasury, (b) be appointed by the President of the United States, (c) be confirmed by the Senate of the United States.

67. That the defendant Taitano (a) is not an officer of the United States Treasury Department, (b) has not been appointed by the President of the United States, (c) has not been confirmed by the Senate of the United States.

68. That the defendant Kennedy (a) is not an officer of the United States Treasury Department, (b) has not been appointed by the President of the United States, (c) has not been confirmed by the Senate of the United States.

69. That the defendant Porter (a) is not an offi-

Exhibit "A"—(Continued)

cer of the United States Treasury Department, (b) has not been appointed by the President of the United States, (c) has not been confirmed by the Senate of the United States.

70. That the defendant Elvidge (a) is not an officer of the United States Treasury Department; (b) has not been appointed by the President to any office in the Treasury Department of the United States, (c) has not been confirmed by the Senate of the United States to any office in the Department of the Treasury of the United States.

71. That Section 3901, Title 26, USCA provides the powers and duties of the Commissioner of Internal Revenue.

(a) That the Commissioner of Internal Revenue acts under the direction of the Secretary of the Treasury.

(b) That no part of this section gives the Commissioner of Internal Revenue any authority, duty or power with respect to any taxes other than United States internal revenue taxes.

72. That Section 3905, Title 26, USCA provides for an Assistant to the Commissioner of Internal Revenue who must be appointed by the President and confirmed by the Senate.

73. That Section 3905, Title 26, USCA provides for Deputy Commissioners of Internal Revenue who must be appointed by the President and confirmed by the Senate.

74. That none of the defendants herein are As-

Exhibit "A"—(Continued)

sistant Commissioners or Deputy Commissioners of Internal Revenue.

75. That Section 3940, Title 26, USCA as amended by the Organization Plan No. 1, Section 1, of 14 March 1952, limits the District Directors of Internal Revenue to a number not exceeding 25.

76. That the unincorporated territory of Guam has not been included in any collection district of the United States.

77. That none of the defendants herein have been appointed District Director of Internal Revenue.

78. That Section 3971 (a), Title 26, USCA provides that all taxes and revenues received under the provisions of this title and collected, of whatsoever nature, received and collected by authority of any internal revenue law (a) shall be paid daily into the Treasury of the United States, (b) under instructions of the Secretary of the Treasury, (c) as Internal Revenue collections by the officer receiving or collecting the same, (d) without any abatement or deduction or claims of any description.

79. That the sums of money collected pursuant to the claimed territorial income tax have not been paid into the Treasury of the United States.

80. That the Commissioner of Internal Revenue has no function in connection with a territorial income tax.

81. That no Tax Court exists within the unincorporated territory of Guam.

82. That the Tax Court of the United States has

Exhibit "A"—(Continued)

no jurisdiction with respect to the claimed territorial income tax.

83. That the claimed territorial income tax is not a part of the internal revenue tax of the United States.

84. That no statute of the Government of Guam provides for requiring the filing of an income tax return.

85. That no statute of the Government of Guam provides a penalty for failure to (a) file an income tax return, (b) pay an income tax.

86. The Federal Insurance Contribution Act (a) is not enforced in Guam, (b) is not part of the claimed territorial income tax, (c) is a tax upon income.

87. The tax on Employees Representatives (a) is not enforced on Guam, (b) is not part of the claimed territorial income tax, (c) is a tax upon income.

88. The tax imposed by Section 1600 Title 26, USCA is claimed to be part of the territorial income tax.

89. The tax imposed by Section 1600 Title 26, USCA is collected by the Government of Guam.

90. That Section 1410, Title 26, USCA imposes a United States excise tax.

91. That the Government of Guam issued an official form with respect to income tax known as Government of Guam Form No. 209.

(a) That this form contained instructions for the

Exhibit "A"—(Continued)

preparation of protests against findings by examining officer with respect to income tax.

(b) That this form contained the appellate rights of a taxpayer under the claimed income tax, including the right to review by regional offices of the United States Internal Revenue Board, the right to file a petition to the Tax Court of the United States, the right of appeals from the Tax Court of the United States to a United States Circuit Court of Appeals, the right to have income tax controversies reviewed by the technical staff of regional offices of the United States Bureau of Internal Revenue.

92. That in fact none of the appellate or other rights set forth in the next question preceding exist.

93. That no technical staff exists in the Government of Guam with respect to the territorial income tax.

94. That no provision exists in the codes of Guam authorizing any adjustment or settlement of any claimed income tax liability.

95. That no provision of the codes of Guam require any person to be admitted to practice before the United States Bureau of Internal Revenue or the Tax Court of the United States before representing any claimant or taxpayer in any internal revenue proceedings.

96. That no provisions exist by which any tax case within the purview of the territorial income tax of Guam can be referred to any regional office and to the technical staff for review.

Exhibit "A"—(Continued)

97. That under the claimed territorial income tax the following sums have been collected from:

(a) The Plaintiff Wilson (1) for the year 1952, $1,136.80; (2) for the year 1953, $1,476.80.

(b) The Plaintiff White (1) for the year 1951, $1,147.90; (2) for the year 1953, $1,723.30.

98. That the Plaintiffs Bogovich and Tintorri have withheld from employees and paid over under the claimed territorial income tax during the period 1951 to 1953 sums in excess of $3,600.00.

99. That Sections 1400-1403, 1410, 1411, 1420, 1421, 1423-1431 of Title 26, USCA are not part of the claimed territorial income tax law.

100. That Sections 1500-1503, 1510-1512, 1520-1522, 1530-1532, 1534-1537 are not part of the claimed territorial income tax law.

101. That Sections 1600-1611 are not part of the claimed territorial income tax law.

102. That Sections 1621-1627, 1630-1636, of Title 26 USCA are (a) not part of the claimed territorial income tax law, (b) do not impose a tax, (c) create collection procedures for use in the United States.

103. That the United States Attorney General has not delegated to officers of the Government of Guam any duties in connection with income tax.

104. That the Secretary of the Treasury is not authorized to delegate to officers of the Government of Guam (a) any powers of the Treasury Department, (b) any authority of the Treasury Department, (c) any duties of the Treasury Department.

105. That defendants Taitano and Kennedy have

Exhibit "A"—(Continued)

issued and published Income Tax Regulations for the territorial income tax numbered 1, 2, 3, and 4.

106. That Title XX of the Government Code of Guam contains the tax laws of the unincorporated territory of Guam.

107. That (a) Chapter 1, Title XX, Government Code of Guam has been repealed. (b) That Chapters 2, 3, 4, 5, and 6, Title XX, Government Code of Guam specifically refer only to the taxes therein levied.

108. That Title XX of the Government Code of Guam does not impose a territorial income tax.

109. That Title XX, Government Code of Guam, does not provide procedures or authority for the collection of a territorial income tax.

[Printer's Note: Attached Request for Admission of Facts requested by Ford Q. Elvidge, Howard D. Porter and Richard Taitano are duplicates of Request for Admission of Facts printed at page 19, and each signed by Finton J. Phelan, Jr., and E. R. Crain, Attorneys for Plaintiffs.]

[Endorsed]: Filed July 20, 1954.

[Title of District Court and Cause.]

## NOTICE OF MOTION

To: Howard D. Porter, Louis A. Otto, Richard Rosenberry and Leon D. Flores, Attorneys for Defendants, Office of the Attorney General, Government of Guam, Agana, Unincorporated territory of Guam.

Please take notice that upon the pleading filed herein and all the documents, files, and exhibits and upon all the proceedings in the instant case, the undersigned will make a cross-motion before the District Court of Guam in the Courtroom of said Court in the Guam Congress Building in the City of Agana, Unincorporated territory of Guam, on Friday, the 30th day of July, 1954, at the hour of 0930 a.m., or as soon thereafter as counsel can be heard, for an order pursuant to Rule 56 of the Federal Rules of Civil Procedure directing that summary judgment herein be entered in favor of the plaintiffs and for such other and further relief as the Court may deem just.

Dated this 19th day of July, 1954.

[Seal] /s/ FINTON J. PHELAN, JR.,
E. R. CRAIN,
Attorneys for Plaintiffs

[Endorsed]: Filed July 20, 1954.

[Title of District Court and Cause.]

## MOTION

Now come the defendants, B. L. Kennedy, Ford Q. Elvidge, Howard D. Porter, and Richard Taitano, and respectfully move this court to extend for thirty (30) days from the 29th day of July, 1954, the time to serve and file their respective sworn statements or written objections, as the case may be in response to the plaintiffs' request for admissions of fact in the above-entitled cause, and in support of said motion show the court that the granting of this motion will expedite the determination of this cause and will further the administration of justice for the following reasons:

(1) That there is now pending before this court defendants' motions to dismiss and for summary judgment which have been set for hearing by this court on the 30th day of July, 1954; and

(2) That the primary purpose of rule 36 of the Federal Rules of Civil Procedure, under which the plaintiffs have filed their request for admissions of fact, is to expedite the trial of the cause and to relieve the parties of the burden and costs of proving facts which will not be disputed at the trial; and

(3) That the primary purpose of rules 12 and 56 of the Federal Rules of Civil Procedure is to expedite the determination of the case without a trial where no substantial merit exists in the complaint; and

(4) That a determination of the defendants' preliminary motions in favor of the defendants would effectuate a determination of this cause and

foreclose the plaintiffs' right to the requested admissions sought; and

(5) That if this motion for extension of time be granted, the court and the parties concerned will avoid a spurious hearing and unnecessary work on the defendants' objections to the requested admissions of fact, should defendants' motions to dismiss and for summary judgment be granted.

It is therefore respectfully requested that the defendants' motion for an order extending the time to serve and file their sworn statements or objections to the plaintiffs' requested admissions of fact be granted.

Dated this 23rd day of July, 1954.

/s/ HOWARD D. PORTER,

Attorney General; Attorney for Defendants, Office of Attorney General, Government of Guam, Agana, Guam;

/s/ LEON D. FLORES,

Island Attorney; Attorney for Defendants, Office of Attorney General, Government of Guam, Agana, Guam;

/s/ LOUIS A. OTTO. JR.,

Deputy Island Attorney; Attorney for Defendants, Office of Attorney General, Government of Guam, Agana, Guam;

/s/ RICHARD ROSEBURG,

Deputy Island Attorney; Attorney for Defendants, Office of Attorney General, Government of Guam, Agana, Guam.

[Endorsed]: Filed July 23, 1954.

[Title of District Court and Cause.]

## ORDER ON MOTION FOR CONTINUANCE

This cause coming on to be heard this 27th day of July, A.D., 1954 on defendants' motion for an order extending the time in which the defendants may serve or file sworn statements or written objections to the plaintiffs' request for admissions, and the plaintiffs being agreeable to such continuance,

Now, Therefore, it is herewith ordered:

1. The defendants shall have until August 26, 1954 in which to file answers or objections;

2. The motions heretofore filed by the defendants for dismissal and for summary judgment and the motion heretofore filed by the plaintiffs for summary judgment shall be continued from July 30, 1954 to August 27, 1954.

Dated and entered this 27th day of July, A.D., 1954.

/s/ PAUL D. SHRIVER,
Judge

[Endorsed]: Filed July 27, 1954.

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[Title of District Court and Cause.]

## AFFIDAVIT

E. R. Crain, being first duly sworn, deposes and says:

1. That he is an attorney-at-law, licensed to practice in the territory of Guam.

2. That sometime in the year 1953, he was employed by Hubert and Virginia Borgstadt, husband and wife, in reference to certain demands then being made upon them by one B. L. Kennedy, who styled himself Commissioner of Revenue and Taxation, Department of Finance, Government of Guam. Said letters of demand stated that the said Hubert and Virginia Borgstadt owed the Government of Guam the sum of Six Hundred Four Dollars and Twenty Cents ($604.20), which the said B. L. Kennedy termed a deficiency in their payment of income taxes to the Government of Guam for the year 1952.

3. That included in the letters, reports, explanations, waivers and item adjustments forwarded with his letter, the said B. L. Kennedy enclosed Guam Government Form No. 209, labelled "Instructions as to the Preparation of Protests Against Findings of Examining Officers." A copy of said form is attached hereto and marked Exhibit "A". On the reverse side of said Government of Guam Form No. 209 is a series of paragraphs headed "Your Appellate Rights".

4. That he complied to the satisfaction of the said B. L. Kennedy with the instructions set out on the face of Guam Government Form No. 209, and filed with the said B. L. Kennedy a protest of notice of deficiency on behalf of Hubert and Virginia Borgstadt.

5. That he was subsequently informed that as the representative of the said Hubert and Virginia Borgstadt, he would be given a hearing before a

Mr. Louis Otto, Jr., an Assistant Attorney General of the Government of Guam.

6. That the said Louis Otto, Jr. at said hearing stated that he constituted the same parties to whom appeal might be made by appellates as were set out in paragraph 2 of that statement labelled "Your Appellate Rights" hereinabove mentioned.

7. That after the conclusion of said hearing before the said Mr. Louis Otto, Jr., the said Mr. Otto informed him that he would be notified of the decision reached by Mr. Otto as a result of the hearing.

8. That he inquired of the said Mr. Otto concerning his right to file a petition with the Tax Court of the United States as set out in paragraph 3 of that portion of Guam Government Form No. 209, labelled "Your Appellate Rights", and that he was informed by Mr. Otto that there was no tax court for the Government of Guam, that the Tax Court of the United States had no jurisdiction in the event such a petition were filed there, and that it made no difference whether the appellates had any recourse to a tax court or not.

9. That there has been turned over to him a letter dated April 2, 1954, which letter is marked Exhibit "B" and attached hereto, in the third paragraph of which letter it is stated that appellates shall have ninety (90) days from the date of the mailing of that letter in which to take such action as may be authorized by law to contest the determination of the deficiency.

10. That in spite of repeated requests by him for information as to what action might be author-

ized by law to contest the determination of the deficiency, neither Mr. Louis Otto, Jr. nor Mr. B. L. Kennedy were able to furnish him with such information.

Further deponent sayeth not.

Dated this 26th day of August, 1954.

/s/ E. R. CRAIN

Subscribed and Sworn to before me this 26th day of August, 1954.

/s/ By ROLAND A. GILLETTE,
Clerk of the District Court of Guam.

EXHIBIT "A"

Instructions As to the Preparation of Protests Against Findings of Examining Officers

The protest and any additional statement of facts must be submitted to this office within 30 days of the date of the letter with which these instructions are enclosed. Such protest and statement must be submitted in triplicate under oath of the taxpayer (in the case of a corporation, the oath of a duly constituted officer). The oath requirement may be satisfied by executing the original of the protest under oath and conforming the remaining copies to the original, that is, by making the copies identical with the original except that, in lieu of the signatures of the executing parties appearing on the

original, the names of the executing parties may be inserted on the copies by typewriter or otherwise. The protest must contain the following information:

(a) The name and address of the taxpayer (in the case of an individual, the residence, and in the case of a corporation, the principal office or place of business);

(b) The designation by date and symbol of the letter advising of the proposed adjustments in tax liability with respect to which the protest is made;

(c) The designation of the year or years involved;

(d) An itemized schedule of the findings to which the taxpayer takes exception;

(e) A statement of the facts upon which the taxpayer relies with respect to each issue it is desired to contest. No reduction in taxes proposed nor increases in allowance of claims will be made unless the facts relied upon are submitted in writing and in verified form. All evidence except that of a supplementary or incidental character shall be submitted over the sworn signature of the taxpayer;

(f) In case the taxpayer desires a hearing, a statement to that effect. In such case the sworn statement of facts referred to in (e) must be submitted at least 5 days before the conference date. If the 5-day rule cannot be complied with, the statement of facts must be accompanied by a sworn statement specifying the reasons therefor;

(g) In case the protest is prepared or filed by an attorney or agent, in addition to the signature of

the taxpayer, it shall have thereon a statement signed by such attorney or agent showing whether or not he prepared it and whether or not the attorney or agent knows of his own knowledge that the facts therein are true; and

(h) In case the taxpayer is represented by an attorney or agent, it is essential that such representative be admitted to practice before the United States Treasury Department and be provided with a power of attorney, signed by the taxpayer, authorizing him to act for the taxpayer. Powers of attorney must be furnished in duplicate with one additional copy for each taxable year in excess of one.

(i) Attention of representatives is called to the necessity of filing with this office a "Statement Relative to Fees" as required by section 2(y) Treasury Department Circular No. 230.

(See over for your appellate rights)

Your Appellate Rights

Upon receipt of a letter from the office of the Collector of Internal Revenue or the Internal Revenue Agent in Charge advising you of a proposed adjustment of your tax, you may execute an agreement form consenting to the adjustment or file a protest with the office from which the letter was received, and request a hearing in that office if one is desired, in accordance with the instructions on the reverse hereof. If a hearing is arranged, you may appear personally or be repre-

sented by an attorney or agent, also as provided in the instructions. If the protest is filed with the Collector's office and an agreement is not reached in that office, your case will be transferred to the office of the Internal Revenue Agent in Charge for further consideration and conference if desired.

If your case is one which originated in the Collector's office but which because of nonagreement is transferred to the office of the Internal Revenue Agent in Charge for further consideration, and an agreement is not reached in that office, or if it is one which originated in the Agent's office, but after protest an agreement is not reached in that office, you may request that your case be referred to the appropriate Regional Office of the Technical Staff, the appellate agency of the Bureau, for further consideration. You may also request a hearing before representatives of that office.

In the event an agreement is not reached in the Technical Staff, your case, if a deficiency is involved, will be returned to the office of the Internal Revenue Agent in Charge for issuance of a final notice of deficiency in which you will be granted 90 days within which to file a petition with The Tax Court of the United States.

If a petition is filed, your case after docketing, will be referred to the Regional Office of the Technical Staff, which office will afford you a further opportunity to settle your case without the necessity of a trial before The Tax Court. If a settlement cannot be reached, your case will be set down for hearing before the Court.

Appeal from the decision of The Tax Court may be made to the United States Circuit Court of Appeals.

If an overassessment only is proposed, the procedure is the same as above, except that your appellate rights do not extend beyond the Technical Staff, unless the case involves a claim for refund disallowed in whole or in part. In such case, you may file suit with the United States District Court or the United States Court of Claims depending upon the amount of the claim.

EXHIBIT "B"

Government of Guam
Agana, Guam

Date: April 2, 1954

Herbert & Virginia Borgstadt
Station 1, House 57
Agana, Guam M.I.

Dear Sir and Madam:

You are advised that the determination of your income tax liability for the taxable year ended December 31, 1952, discloses a deficiency of $604.20, as shown in the statement attached.

In accordance with the provisions of existing Internal Revenue Laws, notice is hereby given of the deficiency mentioned.

Within ninety (90) days from the date of the mailing of this letter, you may take such action as

may be authorized by law to contest the determination of the deficiency.

Should you not desire to take such action you are requested to execute the enclosed agreement form and forward it to this office.

Very truly yours,

/s/ B. L. KENNEDY,
Commissioner of Revenue and Taxation.

Enclosures, Statement, Agreement Form.

[Endorsed]: Filed August 26, 1954.

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[Title of District Court and Cause.]

## OBJECTIONS OF DEFENDANT B. L. KENNEDY TO REQUEST OF PLAINTIFFS FOR ADMISSION OF FACTS

Now comes the defendant B. L. Kennedy, by his attorneys, and objects to the following numbered items of Exhibit "A" accompanying plaintiffs' request for admission of facts:

1. The following items ask for admission of conclusions of law: 1, 2, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 71, 72, 73, 75, 76, 78, 80, 81, 82, 83, 84, 85, 86, 87, 88, 90, 91, 92, 93, 94, 95, 96, 99, 100, 101, 102, 103, 104, 106, 107, 108, 109.

These requested admissions, all calling for conclusions of law, can be classified into a number of groups:

(a) Admissions as to whether or not certain legislation exists, and if it does exist, what it consists of or does not consist of, such as items 1, 2, 5, 6, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 30, 31, 32, 33, 53, 64, 65, 83, 84, 85, 88, 94, 95, 96, 99, 100, 101, 102, 107.

(b) Admissions as to an interpretation of various statutes, what they provide or do not provide, such as Items 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 49, 50, 51, 52, 54, 55, 56, 63, 66, 71, 72, 73, 75, 78, 86, 87, 90, 102, 106, 107, 108, 109.

(c) Admissions as to whether certain authority has been delegated such as Items 47, 48, 57, 58, 59, 60, 61, 62, 103.

(d) Admissions as to whether "interpretations" have been made of the law, such as Items 26, 27, 28, 29.

(e) Such miscellaneous admissions as whether the Government of Guam has taken certain official actions (Items 7, 91); whether the taxpayer has "appellate or other rights" (Item 92); whether a "technical staff" exists (Item 93); whether a tax court exists and what is its jurisdiction (Items 81, 82); as to the function of the Commissioner of Internal Revenue (Item 80); whether Guam is in a collection district (Item 76); whether the Secretary of the Treasury has authority to delegate (Item 104); whether defendants acted through "agents and servants" (Items 24, 25); whether defendants

"personally * * * accepted payments" (Items 24, 25).

Rule 36 is clear in indicating that it provides for admissions of fact and not of law. It is also so interpreted in Fidelity Trust Co. vs. Village of Stickney, 129 F.(2d) 506, where the court ruled that a request for an admission that certain village bonds which had been cancelled were not used to pay property assessments, was a request for a conclusion of law and improper. The Court pointed out that the requested admission was one of the questions in litigation.

"Under the plaintiff's construction of the statute, it (payment) was unauthorized. Under the defendant's construction, it was authorized. To ask the defendant to admit the property owners had not used bonds to pay their assessments and that the cancelled bonds were not paid and cancelled, was not a request for facts but a conclusion of law, and that was the heart of the case."

In the present case the requests objected to are also admissions of law that go to the heart of the case where they are not also irrelevant as hereinafter pointed out. They, in effect, ask the defendants to admit that there is no Guam Territorial Income Tax and that whatever tax there is, the Government of Guam and its officials have no authority to enforce it.

2. The following items are irrelevant: 7, 10, 11 through 22 (except sub-item "j" in each item), 30,

31, 32, 34, 35, 36, 37, 40, 41, 42, 43, 44, 45, 46, 47, 48, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 80, 81, 82, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97 (with respect to amounts prior to May 14, 1952), 98 (with respect to amounts prior to May 14, 1952), 99, 100, 101, 103, 104, 105, 106, 107, 108, 109.

The basic theory of the complaint is that Section 31 of the Organic Act of Guam does not provide for a territorial income tax, but whether it does or does not, the defendants are usurpers as far as any authority to enforce the tax is concerned, and plaintiffs are entitled to a personal judgment for the amount of income taxes previously paid, including amounts withheld by them, as employers, from their employees, or withheld from them as employees by their employers and allegedly paid to the defendants. The court is further asked to restrain the defendants from enforcing the tax and to declare that Section 31 of the Organic Act does not create a territorial income tax.

The items from Appendix "A" enumerated under defendants' second objection are not relevant with respect to the issues of the case, besides, in many instances, as previously indicated, being objectionable as conclusions of law. They can be grouped generally as follows:

(a) Admissions clearly concerned with statutes that have no connection with the specific taxes which constitute the basis of the complaint, such as Items 10 (in fact the Chapters mentioned in 10a,

10n, and 10cc were repealed in 1945, 1942, and 1945, respectively), 86, 87, 88, 89, 90, 99, 100, 101, 106, 107, 108, 109.

(b) Admissions dealing with remedies and procedures, or lack of remedies and procedures, which do not concern the question of whether Section 31 of the Organic Act establishes a territorial tax, or the specific taxes on which the complaint is based, or the authority of the defendants, such as Items 31, 32, 40, 41, 42, 43, 55, 81, 82, 84, 85, 91, 92, 93, 94, 95, 96.

(c) Admissions dealing with authority or lack of authority, or official status or lack of official status, which clearly have no connection with the authority of defendants with respect to the territorial income taxes which are the basis of the complaint, such as Items 11 through 22 (except subitem "j" in each), 34, 35, 44, 45, 46, 47, 48, 55, 56, 57, 58, 59, 60, 61, 62, 66, 67, 68, 69, 70, 71, 72, 73, 74, 77, 80, 102, 104.

(d) Items 97 and 98 are irrelevant to the complaint and all defendants individually with regard to any sums collected, withheld as wages, or paid as taxes prior to May 14, 1952, the date Defendant Richard Taitano assumed the duties of his office as Director of Finance, which is the earliest date any defendant assumed the duties of his office in Guam. As to each other individual defendant, these items are also irrelevant in so far as they refer to periods prior to each defendant's assumption of the duties of his office in Guam, the dates of which are:

B. L. Kennedy, March 27, 1953, as Commissioner of Revenue and Taxation; Ford Q. Elvidge, April 23, 1953, as Governor of Guam; Howard D. Porter, August 31, 1953, as Attorney General of Guam.

(e) Items 36 and 37 concern collection districts and 63, 64, 65 definitions of terms, none of which have any application to the issues of the case.

(f) Items 7 and 105 are concerned with whether or not territorial income tax regulations have been published or issued and by whom, matters extraneous to the issues of the case.

3. Items 23b, 23c, 23e, 91 and 105 in effect deal with the authenticity of documents, and in accordance with Rule 36, copies of the cited documents should be attached to the requests.

4. Items 23 is objected to for a number of reasons.

The phrase "defendants and other agents of the Department of Finance" is ambiguous in that it suggests all four defendants are "agents of the Department of Finance."

The various sub-items cite numerous types of acts, apparently ascribed to all the defendants without reference to any particular time and place. Such broadside requests for admissions are not contemplated under Rule 36. To meet such broad, general statements imposes an intolerable, if not impossible, burden on the defendants.

A number of the sub-items, 23b, 23c, 23e refer

to documents, copies of which should be attached.

Sub-item 23f calls for a conclusion of law.

Defendant accordingly requests that the foregoing objections be sustained.

/s/ HOWARD D. PORTER,
Attorney General

/s/ LEON D. FLORES,
Island Attorney

/s/ LOUIS A. OTTO, JR.,
Deputy Island Attorney

/s/ RICHARD ROSENBERRY,
Deputy Island Attorney
Attorneys for Defendant

[Printer's Note: Attached Objections to Request of Plaintiff for Admission of Facts filed by Ford Q. Elvidge, Howard D. Porter and Richard Taitano are duplicates of Objections to Request of Plaintiffs for Admission of Facts printed at pages 59-65, and each signed by Howard D. Porter, Leon D. Flores, Louis A. Otto, Jr., and Richard Rosenberry, Attorneys for Defendant.]

[Endorsed]: Filed August 26, 1954.

[Title of District Court and Cause.]

## REPLY OF DEFENDANT B. L. KENNEDY TO REQUEST OF PLAINTIFFS FOR ADMISSION OF FACTS

Now comes the defendant B. L. Kennedy, by his attorneys, and in response to the request of plaintiffs for admission of facts, under Rule 36, hereby states as follows with regard to the following items of Exhibit "A" accompanying said request:

1. Items 3, 4, and 79 are admitted as true.

2. With respect to Item 97 generally, the defendants assumed the duties of their respective offices in Guam as follows: Richard Taitano, May 14, 1952, as Director of Finance, Government of Guam; B. L. Kennedy, March 27, 1953, as Commissioner of Revenue and Taxation, Department of Finance, Government of Guam; Ford Q. Elvidge, April 23, 1953, as Governor of Guam; Howard D. Porter, August 31, 1953, as Attorney General of Guam. Requests for admissions as to collection of income taxes prior to May 14, 1952 are irrelevant as to the complaint and all defendants individually. Requests for admissions as to collection of income taxes are irrelevant as to each individual defendant in so far as they refer to periods prior to each defendant's assumption of the duties of his office in Guam.

As to Sub-Item 97a(1), according to the records of the Department of Finance, Plaintiff John Wilson has not filed any 1952 income tax return, but his employer, Brown-Pacific-Maxon, withheld from

his 1952 wages a total of $1,136.80 and paid such amount into the Treasury of the Government of Guam as withholding tax. The date or dates on which such sum, in whole or in part, was withheld from Plaintiff Wilson's wages and paid into the Treasury of the Government of Guam, is not reflected in the records of the Department of Finance, so that defendant has no knowledge as to what portion of said $1,136.80 was withheld and paid on or after May 14, 1952, except that final payment by Brown-Pacific-Maxon of withholdings from its employees' wages generally was made on January 6, 1953.

As to 97a(2), according to the records of the Department of Finance, Plaintiff John Wilson filed his 1953 income tax return on March 15, 1954, showing a tax liability on such return of $1,751.82 and a withholding credit of $1,476.80, leaving a balance of $275.02 which is unpaid; said $1,476.80 withholding credit represents sums withheld from Plaintiff Wilson's wages by his employer, Brown-Pacific-Maxon, and paid by such employer into the Treasury of the Government of Guam as withholding tax.

As to 97b(2), according to the records of the Department of Finance, Plaintiff Leonard White has not filed any 1953 income tax return, but his employer, Brown-Pacific-Maxon, withheld from his 1953 wages a total of $1,723.30 and paid such amount into the Treasury of the Government of Guam as withholding tax.

3. With respect to Item 98 generally, requests

for admissions as to withholding of wages by Plaintiffs Paul Bogovich and Elizabeth Tintorri from their employees and payment over of such sums so withheld as part of the territorial income tax prior to May 14, 1952 are irrelevant as to the complaint and all defendants individually, as stated in preceding paragraph 2. Such requests are also irrelevant as to each individual defendant in so far as they refer to periods prior to each defendant's assumption of the duties of his office in Guam.

According to the records of the Department of Finance, Plaintiffs Bogovich and Tintorri paid into the Treasury of the Government of Guam the sum of $189.30 on July 29, 1952, covering, according to the tax return of such plaintiffs, withholdings from wages of their employees for the first quarter of 1952. The dates on which specific amounts of wages were withheld from time to time, as to all such plaintiffs' employees, collectively or individually, is not reflected in the records of the Department of Finance, so that defendants have no knowledge as to what portion of said $189.30 was withheld on or after May 14, 1952.

According to the records of the Department of Finance, Plaintiffs Bogovich and Tintorri paid into the Treasury of the Government of Guam the sum of $422.20 on August 15, 1952 covering according to the tax return of such plaintiffs, withholdings from wages of their employees for the second quarter of 1952. The dates on which specific amounts of wages were withheld from time to time, as to all such plaintiffs' employees, collectively or individu-

ally, is not reflected in the records of the Department of Finance, so that defendant has no knowledge as to what portion of said $422.20 was withheld on or after May 14, 1952.

According to the records of the Department of Finance, Plaintiffs Bogovich and Tintorri paid into the Treasury of the Government of Guam the following sums, covering, according to the tax returns of such plaintiffs, withholdings from wages of their employees:

(a) $432.40 on October 21, 1952 for the third quarter of 1952.

(b) $553.45 on February 2, 1953 for the fourth quarter of 1952.

(c) $454.30 on April 30, 1953 for the first quarter of 1953.

(d) $229.20 on August 4, 1953 for the second quarter of 1953.

(e) $319.00 on November 2, 1953 for the third quarter of 1953.

(f) $280.00 on February 3, 1954 for the fourth quarter of 1953.

/s/ HOWARD D. PORTER,
Attorney General
/s/ LEON D. FLORES,
Island Attorney

/s/ RICHARD ROSENBERRY,
Deputy Island Attorney
/s/ LOUIS A. OTTO, Jr.,
Deputy Island Attorney
Attorneys for Defendant

Richard Taitano, being duly sworn, states that he is and has been Director of Finance of the Government of Guam since May 14, 1952; that B. L. Kennedy served under his direction and supervision as Commissioner of Revenue and Taxation, Department of Finance, from March 27, 1953 until April 28, 1954, the effective date of B. L. Kennedy's resignation, and is presently not in Guam; and that the facts stated in the foregoing reply to request of plaintiffs for admission of facts are true according to his information and belief.

/s/ RICHARD TAITANO,

Sworn to and subscribed in my presence August 26th, 1954.

[Seal] /s/ V. E. ZAFRA,
Notary Public

[Printer's Note: Attached Reply to Requests of Plaintiffs for Admission of Facts filed by Ford Q. Elvidge, Howard D. Porter and Richard Taitano are duplicates of Reply to Request of Plaintiffs for Admission of Facts printed at pages 66-69, and signed by Howard D. Porter, Ford Q. Elvidge and Richard Taitano respectively.]

[Endorsed]: Filed August 26, 1954.

[Title of District Court and Cause.]

## NOTICE OF HEARING DEFENDANTS' OBJECTIONS

To: Finton J. Phelan, Jr., and E. R. Crain, Attorneys for Plaintiffs.

Please take notice that the foregoing objections will be brought on for hearing before the Honorable Paul D. Shriver, Judge of the above-entitled court, in the said courtroom in the Guam Congress Building on Friday, the 27th day of August, 1954, at 9:30 a.m., or as soon thereafter as counsel can be heard.

Dated this 26th day of August, 1954.

/s/ HOWARD D. PORTER,
Attorney General.

/s/ LEON D. FLORES,
Island Attorney.

/s/ LOUIS A. OTTO, Jr,
Deputy Island Attorney.

/s/ RICHARD ROSENBERRY,
Deputy Island Attorney.

[Endorsed]: Filed August, 26, 1954.

In the District Court of Guam,
Territory of Guam

Civil Case No. 27-54

JOHN WILSON, et al., Plaintiffs,

vs.

B. L. KENNEDY, et al., Defendants.

## OPINION

This matter is before the court on a motion to dismiss for failure to state a cause of action and lack of jurisdiction, and summary judgment as a matter of law filed by the defendants. The plaintiffs have moved for summary judgment. There are in the record briefs, requests for admissions of fact, objections and answers to such requests for admissions of fact, but in the view of the court the basic issues are clear and any detailed discussion will tend to complicate rather than clarify the issues.

The plaintiffs are two employers and two employees of different employers. Their complaint alleges that the defendants, acting without authority, required the plaintiffs and others similarly situated to pay income taxes which were used by the Government of Guam. The plaintiffs request a judgment to the effect that the defendants repay the taxes illegally collected, be enjoined from future illegal collections, and that a declaratory judgment be entered in effect holding that there is no effective territorial income tax law in Guam. The plaintiffs do not contend that if there is an effective income

tax law, and if the defendants are the proper persons to collect that tax, that the plaintiffs have paid more than the law requires them to pay, nor do they contend that any amounts paid by them did not reach the Guam Treasury.

This case is a continuance of the so far abortive effort on the part of some taxpayers to avoid the payment of income taxes on income earned in Guam. The defendants are sued as individuals, but they are the former Commissioner of Revenue and Taxation for Guam, and the present Governor, Attorney General, and Director of Finance for Guam, respectively. In their official capacities they are charged with responsibility for tax collection, but there is no specific statute enacted by the Guam Legislature or by the United States Congress which authorizes them to levy and collect income taxes. Such authority, if it exists, must flow by necessary implication from the law creating the tax and the logical assumption that the United States Congress intended that the tax should be collected and used for the benefit of the Government of Guam. The pertinent provisions are Sections 30 and 31 of the Organic Act of Guam.[1]

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[1] 48 U.S.C.A. 1421h. Duties and taxes to constitute fund for benefit of Guam.

All customs duties and Federal income taxes derived from Guam, the proceeds of all taxes collected under the internal-revenue laws of the United States on articles produced in Guam and transported to the United States, its Territories, or possessions, or consumed in Guam, and the proceeds of any other taxes which may be levied by the Con-

In an action for a declaratory judgment against the Government of Guam involving these provisions it was held that the Government of Guam has sovereign immunity from suit without its consent.[2] in that case the Court of Appeals pointed out that it offered no expression of opinion on the questions as to the right to sue a tax collector as agent of Guam; or the liability at common law of a tax collector as an individual, citing Great Northern Life Insurance Company vs. Read, 322 U.S. 47, 64 S.Ct. 873.

Laguana vs. Ansell[3] brought before the court and answered many of the questions raised by these plaintiffs. In the Laguana case the issues were not, however, clouded by extraneous details. Laguana contended that Ansell had required his employer to withhold and pay income taxes which were exempt from taxation by the United States in the unincorporated territory of Guam within the meaning of

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gress on the inhabitants of Guam, and all quarantine, passport, immigration, and naturalization fees collected in Guam shall be covered into the treasury of Guam and held in account for the government of Guam, and shall be expended for the benefit and government of Guam in accordance with the annual budgets. Aug. 1, 1950, c. 512, 30, 64 Stat. 392.

48 U.S.C.A. 1421i. Applicability of Federal income tax laws.

The income-tax laws in force in the United States of America and these which may hereafter be enacted shall be held to be likewise in force in Guam. Aug. 1, 1950, c. 512, 31, 64 Stat. 392.

[2] Crain vs. Government of Guam, 97 F. Supp. 433, aff. 195 F.2d 414.

[3] 102 F. Supp. 919, aff. 212 F.2d 207.

Section 31. The United States intervened. It was conceded that if Section 31 created a territorial income tax to be collected by the proper officials of the Government of Guam, Laguana had no action. This court discussed at length the legislative history and precedents and held that the effect of Section 31 is to impose a territorial income tax to be collected by the proper officials of the Government of Guam. The Court of Appeals affirmed by per curiam opinion for the reasons given in the opinion of this court.

The Laguana case disposed of any question as to the imposition of the tax and the obligation to pay the tax to the proper officials of the Government of Guam. The plaintiffs in the instant case apparently contend, however, that there are no officials of the Government of Guam who have authority to collect the tax and that those officials who pretended to exercise such authority must repay the amounts collected. In the first place we must distinguish between Section 31, which makes the income tax laws in force in the United States of America, current and future, in force in Guam, and any authority the Guam Legislature may have to legislate in the field. The United States Congress as the parent legislative body made the "income tax laws" applicable. We are dealing with a law of the United States. In this complex field it would appear that the Congress intended to do more than just levy taxes. It intended that the taxpayer on Guam should be governed by the income tax laws in force in the United States at any given time. Like the

taxes themselves, enforcement of collection must necessarily vary or change at the will of the Congress. If the Government of Guam has available facilities to carry out that will, a taxpayer can hardly be heard to complain that he would prefer some different system of collection. As early as 1935 the Treasury Department of the United States ruled in connection with a similar tax in the Virgin Islands[4] that it will be necessary in some sections of the law (Revenue Act of 1934) to substitute the words "Virgin Islands" for the words "United States" in order to give the law proper effect in those islands, and it followed that precedent as regards Guam.[5]

The plaintiffs further complain that the Government of Guam has not established a tax court to consider appeals, but that neglect presents no question which is of justiciable concern to these plaintiffs if their taxes were properly levied and collected. The individual defendants are:

(a) The Governor of Guam who is charged with responsibility faithfully to execute the laws of the United States applicable to Guam and the laws of Guam, 48 U.S.C.A. 1422(b), 64 Stat. 386.

(b) The Attorney General of Guam who is head of the Department of Law for that government, Government Code of Guam, Section 5101.

(c) The Director of Finance who is the head of

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[4] I.T. 2946 (C.B. XIV-2, 109).

[5] 1951-6-13559 I.T. 4046.

the Department of Finance, Government of Guam, Government Code of Guam, Section 5100.

(d) Commissioner of Revenue and Taxation who enforces and administers the territorial income tax (affidavit of Director of Finance).

In the view of this court these plaintiffs can rest secure that those defendants are neither interlopers nor imposters but that they are the duly appointed officials whose responsibility includes the collection of income taxes under Section 31, the appropriate provisions of the United States Revenue Code, and applicable laws of Guam.

Judging from the absence of reported litigation, the income taxpayers in the Virgin Islands have had no difficulty in determining to what officials their territorial income taxes should be paid, although the law affecting them was enacted in the Naval Appropriations Act of 1921, 42 Stat. 122, and was the same as Section 31:

> "except that the proceeds of such taxes shall be paid into the treasuries of said islands."

This court is not unaware of the possibilities of conflicts between two taxing jurisdictions in an appropriate case, but we have no conflict here as these plaintiffs, for themselves and those similarly situated, allege that they are residents of Guam and the income upon which the taxes were levied was earned in Guam. By its intervention in the Laguana case the United States made it abundantly clear that such taxes were to be paid to the Government of Guam in accordance with the precedent set in the Virgin Islands.

The following principles appear to be basic:

1. Section 31 of the Organic Act of Guam imposes a territorial income tax to be paid to and collected by the proper officials of the Government of Guam.

2. The Director of Finance is authorized as the tax collector in Guam to enforce and receive such taxes by himself or his appointees.

3. The tax to be paid ordinarily is measured by the amount of income tax the taxpayer would be required to pay to the United States of America if the taxpayer were residing in the continental United States or its incorporated territories.

4. The applicable provisions in the United States Revenue Code to enforce the payment of the territorial income tax are "income tax laws" within the meaning of section 31 and are available to the Director of Finance or those authorized by him, subject to those non-substantive changes in nomenclature as are necessary to avoid confusion as to the taxing jurisdiction involved.

The defendants' motion for summary judgment is granted and the plaintiffs' motion for summary judgment is denied. The plaintiffs' complaint is dismissed on its merits at plaintiffs' cost.

Dated and entered this 31st day of August, A.D., 1954.

/s/ PAUL D. SHRIVER,
Judge.

[Endorsed]: Filed August 31, 1954.

[Title of District Court and Cause.]

## NOTICE OF APPEAL

Notice is hereby given that John Wilson, Leonard White, Paul Bogovich and Elizabeth Tintorri, the plaintiffs herein hereby appeal to the United States Court of Appeals for the Ninth Circuit from the opinion and final judgment of the District Court of Guam entered in this action on the 31st day of August, 1954.

Dated at Agana, Guam this 20th day of September, 1954.

/s/ FINTON J. PHELAN, JR.,
/s/ E. R. CRAIN,
Attorneys for Plaintiffs

[Endorsed]: Filed September 20, 1954.

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[Title of District Court and Cause.]

## BOND FOR COSTS ON APPEAL

We, the undersigned, jointly and severally acknowledge that we and our personal representatives are bound to pay to B. L. Kennedy, Ford Q. Elvidge, Howard D. Porter, and Richard Taitano, defendants, the sum of Two Hundred Fifty Dollars ($250.00).

The condition of this bond is that, whereas the plaintiffs have appealed to the Court of Appeals

for the Ninth Circuit by notice of appeal filed the 20th day of September, 1954, from the opinion and judgment of this Court entered August 31, 1954, if the plaintiffs shall pay all costs adjudged against them if the appeal is dismissed or the judgment affirmed or such costs as the Appellate Court may award if the judgment is modified, then this bond is to be void, but if the defendant fails to perform this condition, payment of the amount of this bond shall be due forthwith.

/s/ JANET W. GODDARD
/s/ ELDER R. CRAIN

Signed and acknowledged before me this 20th day of September, 1954.

[Seal] /s/ ENRIQUE R. MESA,
Notary Public in and for the unincorporated territory of Guam.

[Endorsed]: Filed September 20, 1954.

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[Title of District Court and Cause.]

## ORDER

Upon motion of plaintiffs-appellants good cause appearing therefor:

It Is Ordered that the time within which to file the record and docket the above entitled cause in the United States Court of Appeals for the Ninth Circuit be and the same is hereby extended to and including the 30th day of November, 1954.

Dated this 19th day of October, 1954, at Agana, Guam.

/s/ PAUL D. SHRIVER,
Judge of the District Court of Guam

[Endorsed]: Filed October 19, 1954.

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[Title of District Court and Cause.]

## STATEMENT OF POINTS ON APPEAL

The points upon which Appellants will rely on appeal are:

1. The Court erred in dismissing the complaint.
2. The Court erred in entering summary judgment for defendants after dismissing the complaint.
3. The Court erred in not entering summary judgment for plaintiffs.
4. The Court erred in entering summary judgment in favor of defendant Kennedy.
5. The Court erred in deciding questions of fact upon affidavits at a hearing upon a motion for summary judgment.
6. The Court erred in deciding the case without considering authorities cited by plaintiffs.
7. The Court erred in finding that no controverted question of fact existed.
8. The Court erred in not finding that all requests for admissions of facts were admitted as a matter of law.
9. The Court erred in not considering admissions of counsel for defendants made in open court.

10. The Court erred in holding that the defendants, or any of them, have authority to collect income taxes under Section 31 of the Organic Act of Guam, the United States Revenue Code and applicable laws of Guam.

11. The Court erred in its interpretation of I. T. 4046.

12. The Court erred in holding that the defendants were sued in their official capacities.

13. The Court erred in its construction of the Organic Act of Guam.

14. The Court erred in its interpretation of the Laguana Case, 212 F.2d 207.

15. The Court erred in holding that applicable provisions of the United States Revenue Code are income tax laws within the meaning of Section 31 (of the Organic Act of Guam) subject to non-substantive changes in nomenclature.

16. The Court erred in failing to recognize the existence of serious questions involving Constitutional Law, the application of the Bill of Rights for Guam and the construction of statutes.

17. The Court erred in failing to comply with mandatory provisions of the Federal Rules of Civil Procedure and in failing to require compliance by the defendants with the same mandatory rules.

Dated at Agana, Guam this 26th day of November, 1954.

/s/ FINTON J. PHELAN, JR.,
/s/ E. R. CRAIN,
Attorneys for Appellants

[Endorsed]: Filed November 27, 1954.

[Title of District Court and Cause.]

## DESIGNATION OF CONTENTS OF RECORD ON APPEAL

Pursuant to Rule 75 (a) of the Federal Rules of Civil Procedure, the plaintiffs-appellants hereby designate for inclusion in the record on appeal to the United States Court of Appeals for the Ninth Circuit, taken by notice of appeal filed September 20, 1954, the following portions of the record, proceedings, and evidence in this action:

1. The complaint.

2. Order extending time of defendants to reply or answer filed May 14, 1954.

3. Motion and supporting points of defendants filed June 9, 1954.

4. Notice of Motion with attached exhibits filed June 9, 1954.

5. Plaintiffs' requests for admissions served on defendants B. L. Kennedy, Ford Q. Elvidge, Howard D. Porter and Richard Taitano on July 19, 1954.

6. Plaintiffs' Notice of Motion for summary judgment served on defendants July 19, 1954.

7. Affidavits of service of requests for admissions and notice of motion for summary judgment filed July 20, 1954.

8. Motion and notice of motion of defendants filed July 23, 1954.

9. Plaintiffs' memorandum of points and authorities with attached exhibit in opposition to defendants' motion to dismiss and for summary judgment and in support of plaintiffs' motion for summary judgment filed August 27, 1954.

10. Defendants' objections to plaintiffs' request for admissions of B. L. Kennedy, Ford Q. Elvidge, Howard D. Porter and Richard Taitano filed August 26, 1954.

11. Reply to plaintiffs' request for admissions filed by B. L. Kennedy, Ford Q. Elvidge, Howard D. Porter and Richard Taitano on August 26, 1954.

12. Defendants' notice of hearing of objections to request of plaintiffs' for admissions filed August 26, 1954.

13. Reporter's transcript of proceedings had on August 27, 1954.

14. Opinion of the Court filed August 31, 1954.

15. Notice of appeal.

16. Order extending time to file record on appeal filed October 10, 1954.

17. Statement of points on appeal.

18. This designation.

19. The journal entries.

20. The minute entries.

21. All other motions and papers filed in this case.

22. The docket entries.

Dated at Agana, Guam this 26th day of November, 1954.

/s/ FINTON J. PHELAN, JR.,
/s/ E. R. CRAIN,
Attorneys for Plaintiffs-Appellants

[Endorsed]: Filed November 27, 1954.

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[Title of District Court and Cause.]

## HEARING ON MOTIONS

Agana, Guam, August 27, 1954

Before the Honorable Paul D. Shriver, Judge.

The Court: Next order of business?

The Clerk: The matter of John Wilson, et al., vs. B. L. Kennedy, et al., hearing on motions.

The Court: Now what questions do we have here?

Mr. Otto: Your honor, if I may speak, the situation is that the defendants filed a motion to dismiss and for summary judgment on June 9. Subsequently the plaintiffs gave notice of a cross-motion for summary judgment and at the same time filed a request for admissions of fact and delivered them to counsel for each of the four defendants in the case. Defendants filed their answers to these requests yesterday, August 26, giving copies to counsel for plaintiffs and at the same time filed objections to certain requests for admissions of fact on

the ground that they are improper, so there are really three orders of business before the court as counsel for the defendants see it—the original motion by the defendants, the cross-motion by plaintiffs and the hearing on the objections.

The Court: Now you both have motions for summary judgment?

Mr. Phelan: (nods head) If it please the court, I believe the objections to requests for admissions should be disposed of first before the motions because those requests for admissions are to be considered with those motions.

The Court: Well, as I pointed out to you previously, I don't see where you have any dispute as to the factual situation. All of the requests for admissions and so forth are just window dressing. It has nothing whatever to do with the facts of the situation, which is this: You have Section 31. Section 31 either carries with it the enforcement machinery in the United States Code adaptable to collections in the continental United States or it doesn't. In your complaint you very clearly point out that these officials purported to act under that authority and that any money that they have collected they have collected for the benefit of the Territory of Guam and paid in. Now your position is that they are acting completely gratuitously, that they have no specific authorization either under the laws of the United States or under the laws of Guam to collect income tax.

Mr. Phelan: We claim they have no authority at all.

The Court: Yes, no authority at all. Now that is your position. The Government of Guam's position is that, by implication, the enforcement provisions in Title 26 of the United States Code become the law of the Territory of Guam, and that, under the affidavits which the officials have presented, they are the officials who are collecting that tax and the officials who are normally charged with that responsibility under the laws of the Territory of Guam. Now with that issue before you, what is there to argue about? It is purely a question of law.

Mr. Crain: If the court please, that is not the entire issue. They also take the stand that they can alter, amend, delete or add sections to the United States Revenue Code as they see fit.

The Court: Administratively.

Mr. Crain: Well, it seems to me they are legislating.

The Court: Yes, I say administratively they can make such alterations.

Mr. Crain: They can enforce it as they see fit so it isn't a matter of their taking the United States Internal Revenue Code and enforcing it as the Code of Guam.

The Court: What about this? Have you raised this question in any way that the court can decide it? You have brought an action here on behalf of two employers, two different employers, and two employees, not employees of the same employer, and you have said in effect that they were told that they had to withhold taxes, which they did, and the employees were told that those taxes had to be paid

into the Government of Guam, which was done, and that the officials had no authority whatever to tell them that or to collect the tax.

Mr. Phelan: Or to receive it.

The Court: Or to receive the tax, exactly. No question is presented in your pleadings that in the collection or the receipt of that tax anything was done which was contrary to Title 26 or was done pursuant to any change or assumption of authority here.

Mr. Phelan: I think otherwise, Judge, because we have claimed that they have no authority whatsoever under Title 26.

The Court: That is right. That is the ultimate fact, that they have no authority at all. The government claims that its authority is derived from Section 31, which carries with it Title 26 so far as is applicable.

Mr. Phelan: Section 31 brings into effect on this island Title 26. It contains no authority that I can find to change a word of it.

The Court: Well, that may be true, but that's what I am getting at, Mr. Phelan. You haven't shown that your particular complainants or plaintiffs have been affected by any changes made administratively outside the purview of 26.

Mr. Phelan: They have because in Title 26 they specify who has authority. Nowhere is the Government of Guam mentioned.

The Court: It seems to me the United States Treasury Department has construed Section 31 as establishing a territorial tax to be administered by

the officials of the Guam government and the United States supports that rule. The taxpayers have therefore complied with the instructions of both governments in meeting their tax liability and their tax has gone into the Treasury of Guam. They cannot now be heard to say that the tax should be returned to them in order that it be paid to the United States and returned to the Guam Treasury from which it was taken. The case of Stone vs. White disposes of any such contention. Now that, of course, is part of the overall opinion in the Laguana case but the Court of Appeals affirms this opinion for the reasons given in this opinion.

Mr. Phelan: Was not the basic reason that there wasn't any claim that relief be granted and wasn't that based on the fact that the parties stipulated?

The Court: It was based in part, of course, upon the fact that the proceeding was useless if the money had reached its proper repository.

Mr. Phelan: I can't follow that at all.

The Court: Well, now if you have a tax levy, which is your first point, and the tax, as you admit, was paid into some officials of Guam and was used by those officials in accordance with the requirements of Section 30, then how can anyone complain?

Mr. Phelan: Judge, can I go over to the post office in San Francisco and pay federal income tax to the postmaster?

The Court: You certainly could if Title 26 provided you should pay your tax into the postmaster.

Mr. Phelan: But it doesn't provide exactly who I should pay it to.

The Court: The Organic Act requires the Governor to enforce the laws of the United States.

Mr. Phelan: My contention is that the Organic Act and everything in it is a federal statute.

The Court: Yes, but how do you reach that point until you have a party who has been injured? How have your plaintiffs in any way been injured here?

Mr. Phelan: They have been injured here by the mere fact that a person not entitled to collect the tax has collected it.

The Court: But that is the very situation, the same general type of situation that the Supreme Court was passing on in the White case. In the White case you had precisely those facts. You had a person who had paid the tax, an inheritance tax, who wasn't liable for it, paid it as a trustee, and the court subsequently held that the tax should have been levied against the heirs and paid by them. The statute of limitations had run by that time as against the heirs. The Supreme Court said that in equity, since the government had gotten the tax, that it would not be heard to say that somebody should pay it back, that the government should pay it back to the trustees since the government was entitled to the tax.

Mr. Phelan: Well, is the Government of Guam entitled to a cent of this tax? Not as I read Title 26.

The Court: Well, what on earth does this language mean? As you know I had definite reservations as to the tax. Largely, of course, my view was much broader than yours. I felt that the tax was levied without the application of 251 regardless of

whether it was to be collected by the United States or whether it was to be collected by the Government of Guam and so held and then pointed out in this opinion that in my view, a view which I think has been substantiated by experience, that large amounts of revenue would escape in Guam due to a newly created government's difficulties in setting up adequate machinery for making effective collection. "Regardless of my initial view that Section 31 imposed a federal tax to be collected by the United States, I believe that I shall add to any existing confusion by persisting in that view in the light of the position taken by the government involved and my conviction that in any event a tax is imposed. I hold that the effect of Section 31 is to impose a territorial tax to be collected by the proper officials of the Government of Guam." Now if that isn't the situation in this case, I don't know what it could be.

Mr. Phelan: Where is the collection authority for these individuals? We are not suing the Government of Guam.

The Court: I would say the proper officials of the Government of Guam and these officials have made affidavits that they are the people who normally collect the taxes.

Mr. Phelan: We have asked the court to take judicial notice that nowhere is there authority to collect any tax except six sub-chapters in there.

The Court: In that case how can you complain? You have paid your tax.

Mr. Phelan: I want it back because the man who

got it can't give a valid receipt and he is not authorized to get it.

The Court: But that is precisely the case.

Mr. Phelan: In this White case you are citing, there is no question about the authority of the person who received the tax to receive the tax. There is here.

The Court: There is authority of the person to receive the tax from that particular person. In other words, it was a legal assessment against the trustees as I remember the case.

Mr. Phelan: Where in the Code of the Government of Guam is there any authority to assess a tax?

The Court: Well, now if the United States Congress levies a tax, somebody has to collect it. In this case it was said the federal government was not charged with the responsibility of collecting the tax and the Court of Appeals upheld that view. They said it was a territorial tax to be collected by the proper officials of the Government of Guam. Now that is finished business. The Supreme Court may overrule this case or reverse it, but that is the law so far as Guam is concerned. So far as the Court of Appeals is concerned the tax is levied to be collected by the proper officials of the Territory of Guam.

Mr. Phelan: Who are they?

The Court: According to the affidavits, the Government of Guam has set up a tax collecting system and that tax collecting system extends from the Governor to the Director of Finance through the

Collector of Internal Revenue appointed by the Government of Guam. Now the other question which I don't see how you can reach in this type of proceeding because if the Government of Guam is entitled to collect the tax and if it is collected properly, then the absence of appellate machinery or court of tax appeals, in so far as your client who is similarly situated is concerned, is immaterial. It might be material if they had withheld their tax for the reason that they had no method of litigating.

Mr. Crain: They didn't. They haven't paid all of their tax. They still owe the Government of Guam tax.

The Court: I thought your complaint stated amounts which were paid.

Mr. Crain: That amount had been paid in by withholding, but the Government of Guam is demanding more from all of them.

The Court: Well, that isn't before us now. That isn't set forth in your complaint.

Mr. Crain: Not in so many words. We did not make a statement.

The Court: No, you are dealing with a tax that has been collected.

Mr. Phelan: We did make a statement that they are demanding in these specific cases additional tax.

Mr. Crain: The Government of Guam admits that in their memorandum of points on motion.

Mr. Otto: Where did we admit that we are demanding anything?

Mr. Crain: In one of the documents you filed you stated defendants Wilson and White both owed

additional sums for 1953 to the Government of Guam, which had been demanded and which had not been paid.

The Court: Well, gentlemen, I am convinced that I am bound by the Laguana decision. I don't think I can go beyond that. I think the Court of Appeals has said that's the law. I don't think you can come in here in behalf of a taxpayer and ask for recovery unless you can demonstrate or allege that the tax was improperly assessed and why it was improperly assessed. You say that I can't go over and pay my tax to the postmaster in San Francisco, but I am quite certain that if I paid the postmaster in San Francisco, he would turn the money over to the Collector of Internal Revenue and credit it to my account and I cannot come in subsequently and say I want the money back because the postmaster had no right to take it.

Mr. Phelan: You wouldn't have a good receipt from the postmaster.

The Court: I would have a receipt when the government said "we credited your account." After all what is a receipt? It's evidence of payment. Who can recollect this tax from you? You mean to say that if the Director of Public Works, for instance, came in and said, "You paid the wrong people; you should have paid me," that you would not have a defense to his action by showing that the money reached the Government of Guam in connection with Section 30, as you have alleged, and due the Government of Guam?

Mr. Phelan: It would be illegally turned over to the Government of Guam.

The Court: It was turned over; it reached the final depositor.

Mr. Phelan: How do we know?

The Court: Because you have alleged it.

Mr. Phelan: We allege it was illegally turned over to the benefit of Guam. What right does a private individual have to set himself up as tax collector, whether he is the Governor or President. If the United States income laws are a part of the law of Guam, the Commissioner of Internal Revenue and various collectors are the individuals to collect the tax; other individuals cannot usurp that power.

The Court: Mr. Phelan, if I owed you $50 and you said to some other client, "I wish Shriver would pay the $50 he owes me," and that person said to me, "Why don't you pay the $50 you owe him? Give it to me now and I will give him the $50." Obviously I haven't paid you, but if he turns the $50 over to you, you can't come back to me and say, "I never gave you a recipt for $50. I received it but I didn't give you a receipt for it. It is still owing."

Mr. Phelan: That is true.

The Court: Now here you have alleged that whether the people were acting illegally or anything else that the money has reached the objective set forth in Section 30.

Mr. Phelan: But there is no authority. The Supreme Court case said despite the fact it went to the Treasury of the State of Massachusetts, they

had no right; it was a case of illegal collection beyond the scope of their authority.

The Court: Section 30 says that all of these taxes, including the federal income tax, "collected in Guam shall be covered into the Treasury of Guam and held in account for the Government of Guam, and shall be expended for the benefit and government of Guam in accordance with the annual budgets."

Mr. Phelan: Who covers and from whom? That is the serious question. Now the Government of Guam is not collecting custom duties. Some of these taxes, if collected, are collected in the States and transferred here. Does the man who collects draw a check and send it to the Government of Guam or does he send it to the United States Treasury? He sends it to the United States Treasury.

The Court: Sure because the law says that. I make my returns to the Collector of Internal Revenue in the States, but the law says that.

Mr. Phelan: The various fees in this court, your honor, go to the Government of Guam but the clerk of this court does not draw that check to the Government of Guam.

The Court: No, that is because the law provides what he should do with fees.

Mr. Phelan: The income tax law says who you will pay it to also. Nothing in Title 26 says where the ultimate money goes. Section 30 says it goes to the Government of Guam, but Section 30 can be read two different ways.

The Court: You haven't alleged here that you

have quitted your tax liability by paying it into the Treasury of the United States. In other words, you are taking the flat pragmatic position that nobody in Guam can collect a tax because the Guam Legislature has not set up, or the United States Congress, a specific method whereby the tax can be collected.

Mr. Phelan: They haven't authorized anybody to act as agent.

The Court: That despite the fact that the United States Congress said the money should be paid in. Under Section 30 the federal tax provisions provides for the levying of the tax. The Government of Guam is charged with carrying out the laws of the United States.

Mr. Phelan: It didn't make that stand up in Immigration.

The Court: Well, that is one thing, of course, we never found out.

Mr. Phelan: Immigration came out and took over.

The Court: They came out and took over but at least up to that point, the court held that he exercised residual responsibility.

Mr. Phelan: I have never been able to find that in any case—residual responsibility. The immigration laws did apply to Guam, the United States Immigration had the responsibility and that was authority for the Immigration people to come out here.

The Court: The United States income tax law and internal revenue law has for many years likewise applied to Guam. There is no absence of federal income tax on Guam. There is an exception if you meet certain things from that tax, but the tax itself is here. That question is moot. It is most stari decisis. The Laguana case has thrown that out the window. Now there is no use arguing with me how to construe Section 31. The Court of Appeals has said it's a territorial tax. The United States income tax laws do apply to Guam, and if a person does not come within that section, they still apply. Of course, the Government of Guam's theory is that they apply inversely, that the citizen of Guam who earns 80 per cent of his income in the United States is exempt from having to pay income tax in Guam.

Mr. Crain: They never have put that in writing, your honor.

The Court: Now I am not implying that I am happy with this present system or that I think the Government of Guam is relieved of responsibility for setting up adequate appellate procedures nor am I passing upon the question of Government of Guam administratively to do things which the Collector of Internal Revenue in the United States could not do, if that is true. I doubt very much whether they have such authority.

Mr. Phelan: I thought we would stipulate, but I never heard anything about the stipulation.

The Court: You have got to bear this in mind, too. In support of what I might call the elastic

point of view, if you had a counterpart of the collection system set up by the local legislature and if the income tax laws of the United States contemplate both the levying and enforcement procedures, we would have continuing confusion every time the United States government changed the United States income tax laws, unless they are self-enforcing.

Mr. Phelan: The statute says the present income tax laws and those which may hereafter be enacted.

The Court: Exactly, that is what I say and those undoubtedly control and under that set-up what would you be doing if the United States, for instance, granted exemptions in excess of those which were in existence when the government of Guam set up its machinery? You would immediately say, "Now, we are entitled to this." The Government of Guam would say, "We are bound by our own law, which you argued back in 1954."

Mr. Phelan: It is an administrative procedure. If they would hold that the change in the statute wasn't to be applied by that administrative section, they would be legislating on tax, not on procedure.

The Court: Well, what I originally started out to try and do this morning was to try to get you people to stipulate as to the facts.

Mr. Phelan: I hoped in 30 days to get an opportunity to, but I never got an opportunity.

Mr. Otto: I spoke twice to Mr. Crain and we were ready and willing to confer with opposing counsel at any time. The first day was on the oc-

casion of the previous hearing and the second occasion was about ten days ago.

The Court: I think the facts are very simple. In other words, the Government of Guam has admitted nearly everything that you have asked for so far as the factual situation is concerned, but you are asking for conclusions of law.

Mr. Phelan: They may also be facts, Judge. What objection can anybody legitimately have to anybody saying this section we are using that the text has not been changed. That is not a conclusion of law; that is a fact.

The Court: That is merely captious. You have access to the United States Code, Section 26.

Mr. Phelan: True, they claim it has been changed. If there is no change, we know exactly.

The Court: All I know is public repute. At least the Congress modified the income tax law, reducing taxes by about ten per cent in the United States. Those reductions were made effective in Guam and as other changes or exemptions are made, the Government of Guam makes them effective in Guam.

Mr. Phelan: I am not talking about that. They say they have made certain changes in the text of the statute. They have claimed that right. If that is not so, let them say so. Let us know that when we take down the United States Code, annotated, that is the section they are talking about.

The Court: What they say is there are certain provisions in the Code of the Government of Guam for adapting the Code of the United States.

Mr. Crain: They say much more than that, your

honor. Mr. Ootto says the right of the appellant to appeal to the United States tax court is not necessary. Now if that isn't a change in the text of the law, I don't know what is. He sets himself up as all of the things that the Internal Revenue Bureau does by law in the States.

The Court: Well, of course, you are getting then in the field of due process of law, which is not before me in this case. You don't say it wasn't levied —if the territorial tax is valid, you don't say it wasn't levied in the Territory of Guam and paid in. Now these matters that you point out here I, of course, am equally surprised that the Government of Guam long before this has not set up a system whereby the taxpayers are given the same rights they would have in the United States, but that isn't before me; for as you recall in the Crain case, it seems to me, that the Court of Appeals went to considerable pains to point out that they weren't passing upon something which had not been raised in the case, as well as the obligation of the collector of the treasury here, in common law, to repay any money which has been illegally collected. From the very citations of their cases I think they want us to be on notice that the collector, pursuant to common law, is liable for any tax illegally assessed or collected, but that isn't your case.

Mr. Phelan: We have a file about that thick. It could be down to about six pages if the conference that was supposed to have been had had occurred. A lot of this would not be necessary and the ques-

tion probably could be in all respects resolved once and for all.

The Court: Now let me ask these questions of the Government of Guam: You have no tax collecting legislation specifically affecting income tax?

Mr. Otto: No legislation by the Government of Guam Legislature specifically directing a department or agency to collect the income tax, as provided under Section 31. However, of course, the Legislature, for example, has appropriated sums of money for the Department of Finance which includes the sums necessary to operate the necessary position of the Commissioner of Internal Revenue and other employees.

The Court: The Government of Guam has not specifically enacted any statutory legislation authorizing any particular official to collect income tax. Now that is a fact?

Mr. Rosenberry: Yes, sir.

The Court: The machinery which you are now using to collect the income tax has been set up by administrative order?

Mr. Otto: It has been set up by the Government of Guam by directive from the Governor to the Department of Finance. I wouldn't say there has been an executive order though.

The Court: You have set up this machinery by direction of the Governor, that income taxes shall be collected through those methods and by that agency which collects other taxes?

Mr. Otto: That is correct, your honor.

Mr. Phelan: Is that in writing?

The Court: That carries with it a modification in that you have an administrative employee whom you call the Collector of Internal Revenue?

Mr. Otto: Yes—no, Commissioner of Revenue and Taxation.

The Court: Is he involved with anything other than income tax?

Mr. Otto: Yes, your honor, he is involved with other taxes.

The Court: Very well. Commissioner of Revenue and Taxation.

Mr. Phelan: If I am not mistaken, if your honor please, the section of the code that sets up that title restricts it to privilege tax.

The Court: You do not have any statutory method for taking an appeal from the rulings of the Commissioner of Revenue and Taxation?

Mr. Otto: The Legislature of the Government of Guam has not set up any formal procedure and the Governor of Guam, as head of the executive department, has not established any formal tax court, but for that matter, which is mentioned also in Mr. Crain's affidavit, it may be pointed out that whether or not the United States tax court is available to hear appeals from decisions of the Commissioner of Revenue and Taxation and to assess them is a matter that is a conclusion of law to be decided, presumably, by some court and any statements made by myself, for instance, are mere matters of opinion.

The Court: Well, what I am saying is what you haven't done. Now that isn't a matter of opinion.

Mr. Otto: No, sir.

The Court: That is what I said at the outset and neither the Legislature nor the Governor of Guam has established a method of appeal from the rulings of the Commissioner of Revenue and Taxation?

Mr. Otto: That is correct, sir, there is no method established whereby the rulings of the Commissioner of Revenue and Taxation could be reversed by an official of the Government of Guam.

The Court: What do you expect the taxpayer to do if he sincerely feels that the commissioner has acted wrongfully?

Mr. Otto: Our position is that the taxpayer can pay the tax and sue for a refund. We feel that is very clear and the second point is one that I mentioned before. It is not impossible that the United States tax court would not take it.

The Court: Do you have any procedure for holding that tax in trust until the matter is determined?

Mr. Otto: No such procedure has been established to hold it in trust.

The Court: Do you think for one moment that the Government of Guam would be in any position to repay taxes paid under protest to the extent roughly of a million dollars?

Mr. Otto: Well, of course, that is not the issue in the case, your honor. However, the Government of Guam has refunded thousands upon thousands of dollars without resort to court procedure.

The Court: You deny the taxpayer the right to file a return in good faith and to contend that no

tax is owing, get a ruling from the Commissioner of Internal Revenue, and then have no place else to go? It stops there?

Mr. Otto: Well, we don't necessarily deny that. We say that further proceedings in a tax court are possible. We don't know what court.

Mr. Crain: If the court please, by their own admission, the tax court of the United States becomes the tax court of Guam by Title 26, so I don't see where Mr. Otto's argument stands up there.

The Court: Well, I don't think anybody would question but that that type of procedure is not in compliance with Section 31.

Mr. Phelan: I doubt that the tax court would take jurisdiction of the question.

The Court: But that is not before me. The only time it comes before me is when somebody wants to use that machinery and it doesn't exist. In other words, I am not at this time required to pass upon the question as to whether the Government of Guam can substitute an arbitrary administrative opinion for a judicial opinion, which the Congress of the United States authorizes and requires in connection with collections in the United States. It seems to me that is a question which has to be raised at the proper time and proper proceedings.

Mr. Phelan: We could add an amendment to this complaint.

The Court: I have to take this complaint as it is. I have a motion for summary judgment before me. I have got your motion for summary judgment. You are through on this complaint.

Mr. Phelan: I believe that summary judgment, if a single contraverted fact and——

The Court: It is not a contraverted fact; it is a contraverted question of law. What I am trying to say throughout—you are agreed as to the facts. You have never had any disagreement. The question is solely one of law. What fact are you going to disagree on?

Mr. Crain: The authority of the four defendants to collect taxes.

The Court: That is a question of law; it is not a question of fact. They freely tell you that they have no statutory, local statutory authority, that they are acting under the implied authority of Section 31.

Mr. Crain: Well, that isn't correct either entirely. Through their arguments they say that they do have statutory authority and that it is Title 26.

The Court: Yes, they say Title 26 is applicable to them. Is that so unusual? Do you think the Congress of the United States would create a vacuum, levy a tax and say nobody is entitled to collect it?

Mr. Phelan: Well, as I understand it, the Commissioner of Internal Revenue is nominated by the President and confirmed by the Senate. Was Mr. Kennedy nominated by the President and confirmed by the Senate?

The Court: What difference does that make as long as you have admitted that the money has gone to the Government of Guam? If the tax was levied and if it was received by the Government of Guam, which is admittedly the case, how can you come in

and say that it was received by someone who had no right to act?

Mr. Phelan: Does that not violate due process?

The Court: No.

Mr. Phelan: Then if I——

The Court: But you are dealing here with an accomplished fact. That tax has been paid. Now you don't think the law is going to say "You give that money back to us and let us pay it to somebody else to pay in and be used by the Government of Guam?"

Mr. Phelan: I am not asking the Government of Guam for anything. I am asking individuals to give back what they had no right to take.

The Court: Then you are reaching the question of the validity of the tax itself.

Mr. Phelan: No, these individuals.

The Court: Well, I don't think we are going to get very far on that.

Mr. Phelan: If I paid my federal income tax to the City of New York instead of to the Collector of Internal Revenue, for instance, I could get it back.

The Court: But if you turned it in to the Collector of New York and he paid it over to the proper authorities——

Mr. Phelan: I mean the tax collector of the City of New York.

The Court: Yes, if he paid it over to the proper authorities and you were given credit for the payment of that tax, I don't think you can come into court and get it back.

Mr. Phelan: He had no right to take it. I think I could recover under common law.

The Court: Not unless you have been damaged. What injury have you suffered under your complaint? If you have a territorial tax and if it is to be collected by proper officials of the Government of Guam and if the tax was levied and if it was paid in by your plaintiffs and if it was used for the benefit of the Government of Guam, in what way have they been prejudiced? What relief could this court possibly give?

Mr. Phelan: Well, I would say this—if I were appointed as tax collector of a federal tax collection district in Guam, I would demand an accounting of all taxes.

The Court: Your position on that, of course, is the position of the plaintiff in the Laguana case. You are still talking about a federal income tax. The courts have now held that it is a territorial tax levied by the United States Congress.

Mr. Phelan: Is it a federal statute or a local statute?

The Court: It's a federal statute applicable locally. The Supreme Court has held many times that it's the responsibility of the United States Congress to legislate for its territories. It is not necessarily bound by the same constitutional restrictions which apply to legislation for the States.

Mr. Phelan: That is true.

The Court: They could make a greater tax here; they could make a lesser tax. They could do what-

ever they wanted. What they have done, according to these opinions, is to create a parallel tax.

Mr. Phelan: We can say the law is found in the United States statute and not the Code of Guam.

The Court: The tax is levied as found in the Organic Act of Guam and the income tax laws, if construed as including enforcement as well as levying, are set forth in Title 26.

Mr. Phelan: In view of the case of Johnson vs. United States, must we not then construe those in the light of the constructions of the federal courts of the United States under Title 26?

The Court: Well, of course, you can't draw a conclusion as to something that isn't before the court, but ordinarily any Act of Congress is construed in the light of the applicable federal decisions. There isn't any doubt about that. Nowhere have we in any of these cases cited anything but federal decisions.

Mr. Phelan: Then on this territorial income tax the canons of construction are United States decisions interpreting Title 26 of the United States Code?

The Court: In the applicable situation.

Mr. Phelan: Then actually there can be no change in the tax.

The Court: It seems to me that the court in the Crain case, which was repeated in the Laguana case, has established the basic criteria to determine whether or not you have a cause of action. That basic criteria is that the court held that taxpayers in Guam are required to pay their tax on exactly

the same basis and measured in the same amount that they would have to pay in the continental United States. Now that is, I think, your proper criteria under Section 31. I don't think you can complain if that tax is paid to the Government of Guam and reaches its eventual resting place, which is the Guam Treasury, unless you can show that you are being required to do something or pay something which is not required if you are residing in the continental United States; not who you pay but what you pay.

Mr. Phelan: Is it not a fact that a man not authorized to do something can be kept from doing that even though the proper official can do it?

The Court: If a person is going to be injured, certainly.

Mr. Phelan: What has injury got to do with it?

The Court: Well, you don't have that question before me. Your tax has been paid.

Mr. Phelan: We are also asking that they be stopped from attempting to collect it.

The Court: Yes, but you haven't shown any damage there.

Mr. Phelan: You have shown damage if the wrong man is trying to collect it.

The Court: If you admit what you say is the wrong man as the man who has paid it into its eventual resting place, where is the damage?

Mr. Phelan: Then anybody who appears to collect a debt from any person and if it gets to the creditor, it is all right?

The Court: Now you have two portions to the

motion. You have, of course, moved for summary judgment on the admissions. You have moved first to dismiss upon the ground of lack of jurisdiction. I don't feel that in the light of the Crain case, that on the fact of their complaint, a motion to dismiss is valid because you are unable to cite statutory authority of which the court can take judicial notice which sets the particular individuals up as being qualified to collect this tax. You have to supplement that as you have by your motion for summary judgment, so the court on the motion to dismiss does not have before it all the factors which would be essential. You have filed your motion for summary judgment as the plaintiffs have. I think I have enough before me to pass upon that motion for summary judgment. Now as to all of these questions—I, of course, read the questions in the beginning. I do not agree with the plaintiffs, the nature of the questions or that they are proper. I think the question is purely one of law, and I think that any questions have been answered by the affidavit in support of the motion for summary judgment. I think it is ridiculous for plaintiffs to say that Ford Q. Elvidge is not Governor of Guam, Howard Porter is not the Attorney General, or that Taitano is not the Director of Finance.

Mr. Phelan: There is no question about that.

The Court: And they have further said in their affidavits who did collect the tax. There is no question that they got the money?

Mr. Phelan: No question that they got the money.

The Court: Your question is a matter of law, a law that they had any authority to get the money. Now that is a question of law; it is not a question of fact so all these questions which relate to whether Title 26—in other words, the Government of Guam could say it doesn't apply or anything else and it would still wind up in this court and the court could ignore this question. The answers are not binding on this court as they would be if you had a strictly factual situation. It is a legal situation, so I think you had better let me take this under advisement and get to work on an opinion. Do you think of anything else that I should have? I will overrule your motion to dismiss. On the face of it, the motion is not an action against the Government of Guam. The motion for summary judgment, of course, is. Do you think of anything else I should have?

Mr. Phelan: You have got the whole file.

The Court: I can't see that you have a question here except whether or not Section 31 carries with it the authority on the part of the Government of Guam to use the counterpart of the enforcement machinery of the United States.

Mr. Phelan: Well, we have also raised a question of due process.

The Court: Well, I don't see how you can complain about due process when you haven't reached the point where you need it. That is like saying "I don't have to plead to an offense in this court because I don't like the way or I don't think the Supreme Court of the United States is legally con-

stituted." When you get to the Supreme Court you are not concerned with whether or not that is the authority. It may never get there. The Collector of Internal Revenue, I presume, disposes of 95 per cent of the objections which are raised.

Mr. Phelan: As I see it, due process of law means regular procedure according to law.

The Court: Now I can readily see that you would have to file a return and if the collector ruled against you and you wanted to appeal under the rights which are set up in the United States and the collector said, "No, we are going to assess and we are going to levy," I think I can readily see where you might be able to come into this court and enjoin him or something of that kind, but you have got to have the situation.

Mr. Phelan: Well, isn't it a fact that there is definitely a question of due process of law?

The Court: I don't think the Government of Guam can slam the door in the face of taxpayers by administrative action without giving them the right to the same process that we have elsewhere. They can't say "We want all of the benefits but accept none of the liabilities," and I don't think they are trying to do that.

Mr. Crain: That I don't agree with you. Mr. Phelan and I feel my affidavit would carry as much weight as Governor Elvidge's, and I say they did that—slammed the door and denied the right.

The Court: But you didn't say these taxpayers lost anything.

Mr. Crain: I said that these taxpayers were

being forced to pay $624 to the Government of Guam without any recourse beyond the Attorney General's office.

The Court: You don't say that that $624 was improperly levied.

Mr. Phelan: There is the question of due process and it is a question of whether it was properly levied.

Mr. Crain: And we have no place to go to find out.

The Court: But that is not your plea. Nowhere do I find in the pleadings that you have alleged that if the taxpayer resided, both the employer and employee, in the United States that that tax was not proper.

Mr. Phelan: This is the affidavit of one, not one of the named plaintiffs. With respect to the person——

The Court: I think that has to be raised in the proper action. I think all you have raised here is the authority of the Government of Guam to act under Section 31. In other words, the position the Government of Guam takes is that the right to enforce is implicit in the authority vested under Section 31. I almost forgot—you are doing the same thing, of course, here that you did in the Laguana case. Long after Ansell had ceased to have an official position in the Government of Guam, Ansell was a party to the action. Now Kennedy is gone. He is no longer the collector and neither one of you has moved to make the new collector the party.

Mr. Crain: The new collector didn't collect any of the things we are talking about here.

The Court: You are asking for a class judgment. In other words, if you got a judgment against Kennedy, it wouldn't be valid on the present collector.

Mr. Phelan: No, it would be a personal judgment.

The Court: Yes, it would have to be.

Mr. Phelan: There is no relief requested against the Government of Guam.

The Court: Well, if you are going to reach your eventual objective, the court, of course, has to hold —no doubt in my mind on that—I have to hold that you are suing the Governor of Guam and the other officials in their official capacities. Now I think you won't for a moment get away with the fiction that you are dealing with mere interlopers in this government. You are not. You are dealing with the regularly appointed officials and you can't deny that.

Mr. Phelan: But the mere fact that a man is an official——

The Court: So you are suing them in their official capacities.

Mr. Phelan: I deny that.

The Court: You certainly aren't suing them for any matter which they are not doing in their official capacities.

Mr. Phelan: Yes. I say it's beyond their scope. I have cited several Supreme Court cases on that

point where officials were sued for acting beyond the scope of their authority.

The Court: Exactly, but you have just agreed with me when you say "officials were sued." That is what I am saying, "officials," not as individuals.

Mr. Phelan: Officials acting as individuals. There is one involving the State of Georgia about two years ago.

The Court: Now, I will take this matter under advisement and I will prepare a written opinion and will rule on the question of summary judgment since both of you have moved for summary judgment. I think the issue is still a bit more confused than it would have been if you had done what I consider the logical thing and that is reduce all questions to stipulations 1, 2, 3, where you wouldn't have any doubt left, but I think I can dispose of the matter on the summary judgment. Any further business?

The Clerk: No other matters, your honor.

The Court: The court will stand adjourned until further notice.

(The court adjourned at 11:10 a.m., August 27, 1954.)

[Endorsed]: Filed November 27, 1954.

[Title of District Court and Cause.]

## ORDER

Upon request of the Clerk of the Court and good cause appearing therefor:

It Is Ordered that the Clerk of the Court shall have until and including December 9, 1954, in which to file and docket the record on appeal in the within captioned case.

Dated November 29, 1954, at Agana, Guam.

/s/ PAUL D. SHRIVER,
United States Judge for the
District Court of Guam

[Endorsed]: Filed November 29, 1954.

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[Title of District Court and Cause.]

## JOURNAL ENTRIES AND MINUTES

1954

6-10—Notice and Motion to Dismiss and for entry of Summary Judgment having been filed by defendants—Kennedy, Elvidge, Porter and Taitano, Ordered hearing set for Friday, July 30, 1954, at 9:30 a.m.

7-20—Notice and Cross-Motion for Summary Judgment having been filed by the plaintiffs, Ordered hearing set for Friday, July 30, 1954, at 9:30 a.m.

1954

7-23—Motion and Notice of motion for extension of time having been filed by the attorneys for the defendants, Ordered hearing on said motion set for Tuesday, July 27, 1954, at 8:30 a.m. in Judge's Chambers.

7-27—Hearing: Attorneys present. After hearing arguments of attorneys, Ordered that defendants have until August 26, 1954, in which to file answers or objections. Hearings set for July 30, 1954, continued to August 27, 1954 at 9:30 a.m.

8-27—Hearing: Plaintiffs appearing by E. R. Crain and Finton J. Phelan, Jr., their attorneys. Defendants appearings by Louis A Otto, Jr., and Richard Rosenberry, their attorneys. Having heard the arguments of the attorneys for the respective parties, Court overrules defendants motion to dismiss and takes under advisement the plaintiffs' and the defendants' motions for Summary Judgment. Court will prepare and file written Opinion and Orders.

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[Title of District Court and Cause.]

## CERTIFICATE OF CLERK

I, Roland A. Gillette, Clerk of the District Court of Guam for the Territory of Guam, M. I., do hereby certify that the following documents, to wit:

1. Complaint—filed April 30, 1954.

2. Order granting extension of time—filed May 14, 1954.

3. Motion with supporting documents — filed June 9, 1954.

4. Notice of Motion—filed June 10, 1954.

5. Requests for Admission of Facts—served on all defendants on July 19, 1954—filed July 20, 1954.

6. Plaintiffs' Notice of Motion for Summary Judgment—filed July 20, 1954.

7. Affidavit of service of Request for Admissions —filed July 20, 1954.

8. Affidavit of service of Notice of Motion—filed July 20, 1954.

9. Defendants' Motion for extension of time—filed July 23, 1954.

10. Notice of Motion—filed July 26, 1954.

11. Order for Hearing on Motion—filed July 26, 1954.

12. Affidavit of service on E. R. Crain—filed July 26, 1954.

13. Affidavit of service on F. J. Phelan—filed July 26, 1954.

14. Order on Motion for Continuance—filed July 27, 1954.

15. Affidavit of E. R. Crain with Exhibit "A"—filed August 26, 1954.

16. Plaintiffs' Memorandum of Points and Authorities in opposition—filed August 27, 1954.

17. Objections of defendant — Kennedy — filed August 26, 1954.

18. Objections of defendant—Elvidge—filed August 26, 1954.

19. Objections of defendant—Porter—filed August 26, 1954.

20. Objections of defendant—Taitano—filed August 26, 1954.

21. Reply of defendant Kennedy—filed August 26, 1954.

22. Reply of defendant Elvidge—filed August 26, 1954.

23. Reply of defendant Porter—filed August 26, 1954.

24. Reply of defendant Taitanò—filed August 26, 1954.

25. Affidavit of Service on E. R. Crain—filed August 27, 1954.

26. Affidavit of Service on F. J. Phelan—filed August 27, 1954.

27. Motion of Hearing Defendants Objections—filed August 26, 1954.

28. Opinion—filed August 31, 1954.

29. Notice of Appeal—filed September 20, 1954.

30. Bond for Costs on Appeal—filed September 20, 1954.

31. Order of court extending time—filed October 19, 1954.

32. Statement of Points on Appeal—filed November 27, 1954.

33. Designation of Contents of Record on Appeal —filed November 27, 1954.

34. Court Reporter's Transcript of Proceedings —filed November 27, 1954.

35. Order of Court extending time—filed November 29, 1954.

36. Journal entries and Minutes of proceedings in open Court.

are the original documents filed in the office of the clerk of this court in the above entitled case.

In Witness Whereof, I have hereunto subscribed my name and affixed the Seal of the aforesaid court at Agana, Guam, M. I., this 2nd day of December, A.D. 1954.

[Seal] /s/ ROLAND A. GILLETTE,
Clerk of the Court

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[Endorsed]: No. 14593. United States Court of Appeals for the Ninth Circuit. John Wilson, Leonard White, Paul Bogovich and Elizabeth Tintorri, Appellants, vs. B. L. Kennedy, Ford Q. Elvidge, Howard D. Porter and Richard Taitano, Appellees. Transcript of Record. Appeal from the District Court of Guam, Territory of Guam.

Filed: December 7, 1954.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14593

JOHN WILSON, LEONARD WHITE, PAUL BOGOVICH, and ELIZABETH TINTORRI,
Plaintiffs-Appellants,

vs.

B. L. KENNEDY, FORD Q. ELVIDGE, HOWARD D. PORTER, and RICHARD TAITANO,
Defendants-Appellees.

ADOPTION OF STATEMENT OF POINTS REQUIRED BY RULE 75(d) PREVIOUSLY FILED

The appellants hereby adopt the statement of points filed with the designation of record in this cause on 27th day of November, 1954.

Dated at Agana, Guam, this 20th day of December, 1954.

/s/ FINTON J. PHELAN, JR.,
/s/ E. R. CRAIN,
Attorneys for Appellants

[Endorsed]: Filed December 23, 1954. Paul P. O'Brien, Clerk.